DOCKET

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Status: GRANTED

Title: Federal Labor Relations Authority, Petitioner
v.
Aberdeen Proving Ground, Department of the Army

Docketed:
April 24, 1987

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Peters,Ruth E.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Apr 24 1987	G	Petition for writ of certiorari filed.
3	May 12 1987		Order extending time to file response to petition until June 23, 1987.
4	Jun 18 1987		Order further extending time to file response to petition until July 7, 1987.
5	Jul 2 1987		Brief of respondent Aberdeen Proving Ground in opposition filed.
6	Jul 8 1987		DISTRIBUTED. September 28, 1987
7	Oct 5 1987		Petition GRANTED.
			**********
8	Oct 14 1987	G	Motion of petitioner to dispense with printing the joint appendix filed.
9	Nov 2 1987		Motion of petitioner to dispense with printing the joint appendix GRANTED.
10	Nov 19 1987		Brief of petitioner FLRA filed.
11	Dec 3 1987		Record filed.
		*	Certified copy of original record, 6 volumes, received.
12	Dec 18 1987		Brief of respondent Aberdeen Proving Ground filed.
13	Jan 5 1988		CIRCULATED.
14	Jan 5 1988		SET FOR ARGUMENT. Tuesday, February 23, 1988. (2nd case). (1 hour).
15	Jan 19 1988	X	Reply brief of petitioner FLRA filed.
16	Feb 11 1988		Lodgings received. (12 copies).
17	Feb 23 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 1715

Supreme Court, U.S.
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CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL LABOR RELATIONS AUTHORITY,
PETITIONER

v.

ABERDEEN PROVING GROUND,
DEPARTMENT OF THE ARMY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, the Federal Labor Relations Authority is empowered to resolve, in an unfair labor practice proceeding involving allegations of a failure to bargain over changes in employee working conditions, the employer agency's defense that a "compelling need" exists for an agency regulation so as to bar negotiations over proposals inconsistent with the regulation, just as the Authority indisputably can resolve in an unfair labor practice proceeding other employer defenses to the bargaining obligation.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

FEDERAL LABOR RELATIONS AUTHORITY,
PETITIONER
v.
ABERDEEN PROVING GROUND,
DEPARTMENT OF THE ARMY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Federal Labor Relations Authority petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The judgment of the court of appeals (App. 16a), summarily reversing the decision of the Authority, is unreported. The court's earlier denial of the Authority's petition for hearing *en banc* (App. 17a) is unreported. The previous decision of the court of appeals (App. 52a-69a) involving the same question, and upon which the court's summary reversal was based, is reported at 762 F.2d 409; the court's denial of the petition for rehearing, in that case, with suggestion for rehearing *en banc* (App. 70a) is unreported. The decision and order of the Federal Labor Relations Authority (App. 18a-51a) is reported at 21 F.L.R.A. No. 100.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. 7101-7135 (1982 & Supp. III 1985) are reproduced in the appendix (App. 1a-6a).

STATEMENT

1. The Federal Service Labor-Management Relations Statute ("the Statute") governs labor-management relations in the federal service.[1] Under the Statute, the responsibilities of the Federal Labor Relations Authority ("the Authority") include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representational election matters, and resolving exceptions to arbitration awards. See 5 U.S.C. 7105(a)(1),(2); see also *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983). The Authority may also "take such other actions as are necessary

[1]The Statute was enacted as section 701 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.).

and appropriate to effectively administer the provisions of [the Statute]." 5 U.S.C. 7105(a)(2)(I). The Authority is also empowered to engage in formal rulemaking pursuant to 5 U.S.C. 7134, and to "provide leadership in establishing policies and guidance" relating to federal sector labor relations matters, pursuant to 5 U.S.C. 7105(a)(1). *BATF* v. *FLRA*, *supra*, 464 U.S. at 93. The Authority may petition for enforcement of its orders in appropriate United States courts of appeals. 5 U.S.C. 7123(b). Persons, including federal agencies, who are aggrieved by certain types of Authority orders may seek judicial review in the courts of appeals. 5 U.S.C. 7123(a).

a. Under the Statute, a federal agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment and, upon the request of either party, execute a document embodying the agreed upon terms. 5 U.S.C. 7103(a)(12), 7114(b)(2), 7114(b)(5). The Statute defines "conditions of employment" as "personnel policies, practices and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * * ." 5 U.S.C. 7103(a)(14). However, the Statute also expressly excludes certain matters from the general obligation to bargain. There is no duty to bargain over the rights the Statute reserves to management as nonnegotiable. 5 U.S.C. 7106. Further, there is no duty to bargain over proposed contract language which would bring about an inconsistency with a federal law, or with a government-wide rule or regulation. 5 U.S.C. 7117(a)(1).

As is relevant to this case, there is also no duty to bargain over proposed contract language which would bring about an inconsistency with either an agency regulation or a regulation of an agency's primary national subdivision whenever the Authority determines,

under the criteria set forth in 5 C.F.R. 2424.11, that a compelling need exists for the regulation. 5 U.S.C. 7117(a)(2), (a)(3). The employer agency which issued the regulation bears the burden of demonstrating to the Authority that the regulation in question satisfies one of the three criteria set out in the Authority's regulations for establishing compelling need. See 45 Fed. Reg. 3485 (1980).

b. Section 7117(b)(1) of the Statute empowers the Authority to resolve compelling need issues where, during the course of collective bargaining, "an exclusive representative alleges that no compelling need exists for any rule or regulation * * * which is then in effect and which governs any matter at issue in such collective bargaining." 5 U.S.C. 7117(b)(1). The Authority's regulations implementing this provision require that when an agency refuses to bargain over a proposal during ongoing collective bargaining negotiations because the proposal is alleged to be inconsistent with an existing agency-wide regulation for which a compelling need exists, and no actual or contemplated changes in conditions of employment are involved, the compelling need issue is resolved through the procedures in section 7117 of the Statute and Part 2424 of the Authority's regulations. 5 C.F.R. 2424.5 (App. 10a).

However, a different situation is presented where alleged unilateral changes in conditions of employment are involved. Section 7116(a)(5) makes it an unfair labor practice for an agency "to refuse to consult or negotiate in good faith with a labor organization as required by the [Statute]." 5 U.S.C. 7116(a)(5). As is relevant to this case, the bargaining obligation is specifically triggered whenever management seeks to initiate a change in conditions of employment of unit employees. See, *e.g.*, *FLRA* v. *Social Security Administration*, 753 F.2d 156

(D.C. Cir. 1985); cf. *NLRB* v. *Katz*, 369 U.S. 736 (1962) (under the National Labor Relations Act). In this connection, the Authority has consistently held that an agency violates the obligation to bargain when it unilaterally institutes a change in conditions of employment without notification to or bargaining with the employees' exclusive bargaining representative. See *FLRA* v. *United States Department of the Air Force, Tinker Air Force Base*, 735 F.2d 1513, 1515 n.5 (D.C. Cir. 1984). See also, *e.g.*, *Veterans Administration West Los Angeles Medical Center, Los Angeles, California*, 24 F.L.R.A. No. 73 (1986); *Internal Revenue Service, Western Region, San Francisco, California*, 11 F.L.R.A. 655 (1983); *Department of the Air Force, Scott Air Force Base, Illinois*, 5 F.L.R.A. 9 (1981).

To resolve disputes involving an employing agency's alleged unilateral changes in conditions of employment, where issues of negotiability—including, as in the instant case, assertions of compelling need for agency regulations—are raised as affirmative defenses, the Authority has promulgated specific procedures. These procedures recognize a union's right either: (1) to seek resolution of the entire dispute, including the negotiability issues, in the unfair labor practice forum; or (2) to seek initial and separate resolution of the negotiability issues in the negotiability appeal forum. 5 C.F.R. 2423.5 and 2424.5 (App. 6a-7a, 10a).

2. On September 15, 1981, Aberdeen Proving Ground ("Aberdeen" or "the agency") met with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO ("the union") and informed the union of its decision to curtail operations of Aberdeen on the day after Thanksgiving, and that employees would be placed on "forced annual leave" for that day (App. 19a). The union sought to negotiate

concerning the impact of Aberdeen's decision to curtail its operations and to negotiate the procedures leading to its implementation (App. 19a). During negotiations held in October, the union presented, among other things, two proposals to grant administrative leave to all employees during the closure of Aberdeen's operations, rather than, as decided by Aberdeen, to place employees on forced annual leave (App. 19a).

Aberdeen refused to bargain on these proposals, stating that Department of Defense (Defense) and Department of the Army (Army) regulations precluded a grant of administrative leave for an anticipated closure of operations (App. 19a).[2] The negotiation sessions ended, and at no time prior to the closing did Aberdeen rescind its refusal to bargain over the union's proposals (App. 19a).

The Authority's General Counsel issued an unfair labor practice complaint alleging that Aberdeen's refusal to negotiate over the union's administrative leave proposals was a failure to negotiate in good faith with the union in violation of the Statute (App. 34a). The complaint was heard before an Authority Administrative Law Judge (ALJ) who concluded in his recommended decision and order that, among other things, Aberdeen had no duty to bargain over the union's proposal regarding the granting of administrative leave because the Authority had not previously determined that there was no compelling need for the agency regulations with which the union's proposals were inconsistent (App. 45a).

[2]These regulations are referred to as "agency" regulations, although the Army regulation (as opposed to a Department of Defense regulation) is a regulation of a "primary national subdivision." See 5 U.S.C. 7117(a)(2).

3.a. After issuance of the ALJ's recommended decision, but prior to the Authority's decision in this case, the Authority in *Defense Logistics Agency*, 12 F.L.R.A. 412 (1983) had its first occasion to examine the contention that the issue of a compelling need for an agency regulation could never be resolved in an unfair labor practice proceeding. In that case the Authority noted that it had issued regulations (5 C.F.R. 2423.5 and 2424.5) which concern the Authority's statutory authority to resolve disputes involving alleged unilateral changes in conditions of employment where issues of negotiability are also raised. *Defense Logistics Agency*, 12 F.L.R.A. at 415. The Authority noted that in such cases the Authority's regulations allow the labor organization to seek resolution of the negotiability issues by filing both an unfair labor practice charge and a negotiability appeal, but that the regulations also require the labor organization to select the forum in which to proceed first. *Ibid.* As applied to the dispute at hand, the Authority stated that if the union has selected the unfair labor practice forum in which to proceed, and if the negotiability issue in the case involves an agency assertion that a compelling need exists for the agency regulation, then the compelling need issue must perforce be decided in the unfair labor practice proceeding. *Defense Logistics Agency*, 12 F.L.R.A. at 416.

b. The D.C. Circuit enforced this decision of the Authority in *Defense Logistics Agency* v. *FLRA*, 754 F.2d 1003 (D.C. Cir. 1985). The court examined the language and legislative history of the Statute, but did not find that they conclusively resolved the dispute over whether the Authority was empowered to resolve compelling need negotiability issues in unilateral change unfair labor practice cases where the compelling need issue arises as part of an agency's affirmative defense.

754 F.2d at 1007-1008. The court then examined the Executive Order practice which predated the Statute. 754 F.2d at 1008-1011. The court noted that under the Executive Order, the Assistant Secretary of Labor for Labor-Management Relations (the office which had the responsibility of resolving unilateral change unfair labor practice cases in the federal sector) was authorized to resolve any negotiability issues necessary to the resolution of such a case without first referring the negotiability issues to the Federal Labor Relations Council. 754 F.2d at 1009-1011. The court noted that this jurisdiction of the Assistant Secretary to decide negotiability issues in unilateral change unfair labor practice cases was an exception to the general requirement that negotiability appeals were to be filed directly with the Council. 754 F.2d at 1010-1011. The court concluded that, while not compelled, it was more natural, in applying this practice to the resolution of compelling need issues, to read "negotiability" as meaning all aspects of negotiability, including compelling need. 754 F.2d at 1011.

The D.C. Circuit found further that the reasonableness of the Authority's construction of the Statute was additionally supported by the fact that it streamlined and shortened the dispute resolution process. 754 F.2d at 1011. Further, the court found that the Authority's construction provided a forum in which a remedy for the refusal to bargain in unilateral change cases can be fashioned if no compelling need is found for the regulation. *Ibid.* Accordingly, noting the standard in *Chevron* v. *National Resources Defense Council*, 467 U.S. 837, 843 (1984), for judicial review of an agency construction of its enabling act once it has been determined that Congress did not directly address the precise question of statutory construction at issue, the court concluded the Authority's construction was "not

only a permissible reading of the Statute, but also a reasonable one, in the truest sense — namely, that the Authority had good reasons for reading the Statute in that way." 754 F.2d at 1014.

4. The propriety of the Authority's resolution of a compelling need issue as part of a unilateral change unfair labor practice case was next reviewed in the Fourth Circuit in *United States Army Engineer Center, Fort Belvoir* v. *FLRA*, 762 F.2d 409 (4th Cir. 1985) *(Fort Belvoir)* (App. 52a-69a). The Fourth Circuit disagreed with the Authority and the D.C. Circuit. The court found, principally, that the Authority's construction was at variance with the "plain language" of Section 7117 which states, in part, that the duty to bargain extends to an agency rule or regulation *"only if* the Authority *has determined under subsection (b) of this section"* that no compelling need exists for the rule or regulation (App. 60a) (emphasis in original). The court stated these words in the Statute "are those of condition precedent" and that it "is clear that any duty to bargain on the employer's part arises only after the FLRA *'has determined'* that no compelling need for the disputed regulation exists" (App. 61a) (emphasis in original). The court concluded that "[i]t is illogical, in light of this language, to maintain that a union could charge an agency with 'having engaged in or engaging in an unfair labor practice,' 5 U.S.C. § 7118(a), because the employer has refused to bargain over subject matter as to which no duty to bargain *has been determined* to exist" (App. 61a) (emphasis in original).

The Authority petitioned for rehearing of the court's decision, with suggestion for rehearing *en banc*. The court denied both on July 26, 1985 (App. 70a).

5.a. Given the conflict between the D.C. and the Fourth Circuits, when the Authority issued its decision in the instant case (App. 18a-32a), it reexamined the

propriety of the Authority's resolving an agency's compelling need defense as part of a unilateral change unfair labor practice case. The Authority considered the consistency of its prior holdings with the terms of the Statute and with the Authority's own regulations (5 C.F.R. 2423.5 and 2424.5) (App. 21a-24a). The Authority compared its resolution of the compelling need issues in such an unfair labor practice case with its practice of resolving in unilateral change unfair labor practice cases all the other various defenses of nonnegotiability, *i.e.*, defenses involving the other bases set out in the Statute for rendering matters nonnegotiable (App. 23a-24a). The Authority considered its practice in light of the legislative history of the Statute and in light of the experience under the Executive Order and found support for the continuation of the Authority's practice (App. 24a-25a). The Authority weighed considerations of public policy and found that, in those cases where no compelling need is found to exist, the Authority's practice promotes the collective bargaining process by resolving all relevant issues in one proceeding (thereby obviating the delay inherent in two separate and consecutive proceedings) and it affords the union access to a remedy for the agency's failure to bargain (App. 25a-26a). Moreover, the Authority noted that its practice fully preserves an agency's right not to negotiate in those cases where the agency's assertion of a compelling need is upheld (App. 25a-26a). As a result of this reexamination, the Authority reaffirmed its conclusion that the Authority can properly resolve the merits of an agency's compelling need defense for an agency regulation in a unilateral change unfair labor practice case (App. 26a).

b. In connection with the particular compelling need issue involved in the instant case, the Authority concluded that Aberdeen had failed to sustain its burden

of establishing, in accordance with the Authority's criteria in 5 C.F.R. 2424.11, a compelling need for the Defense and Army regulations (App. 27a). The Authority noted that Aberdeen had argued that there was a compelling need for the regulations because they were essential to meet its objective in curtailing operations, which was to conserve energy (App. 27a). However, the Authority found that Aberdeen had failed to establish how the granting of administrative, rather than annual, leave in any way affected Aberdeen's stated objective of conserving energy (App. 27a). The Authority noted that Aberdeen's operations would be curtailed to the same extent, and energy conserved to the same extent, whether the employees affected were on annual leave or administrative leave on the day in question (App. 27a).

Accordingly, the Authority concluded that Aberdeen violated Section 7116(a)(1) and (5) of the Statute when it refused to bargain concerning the union's proposal to grant employees administrative leave on the day after Thanksgiving, submitted in response to Aberdeen's notice that operations would be curtailed on that date (App. 28a). Among other things, the Authority ordered Aberdeen to bargain concerning the union's proposal to grant administrative leave in lieu of forced annual leave for November 27, 1981 (App. 29a).

c. Aberdeen petitioned for review of the Authority's decision in the Fourth Circuit. The court, after full briefing by the parties, which included a motion by the Authority that the court hear the case *en banc*, denied the Authority's motion that the case be heard *en banc* (App. 17a). Subsequently, Aberdeen moved the court to reverse summarily the Authority's decision because it was in conflict with the court's earlier decision in

Fort Belvoir. On January 28, 1987, the Fourth Circuit granted Aberdeen's motion and summarily reversed the Authority's decision "on the authority of *U.S. Army Engineer Ctr., Fort Belvoir v. FLRA*, 762 F.2d 409 (4th Cir. 1985)" (App. 16a).[3]

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals concludes—in direct conflict with the D.C. Circuit's decision in *Defense Logistics Agency* v. *FLRA*, 754 F.2d 1003 (D.C. Cir. 1985)—that the Statute prohibits the Authority from resolving, in a unilateral change unfair labor practice case, an employer agency defense of its refusal to bargain by asserting that bargaining is barred by an agency regulation for which a compelling need exists. The court's conclusion is in marked contrast to the treatment of other employer defenses, which indisputably can be resolved in a unilateral change unfair labor practice case. The court goes even further, however, and concludes that an agency's simple assertion of the compelling need defense in a unilateral change unfair labor practice case postpones the duty to bargain from arising until the Authority, in a separate negotiability proceeding, concludes there is no compelling need for the agency regulation.

This interpretation of the Statute by the court below disregards one of the most basic tenets in both federal sector and private sector labor law—that an employer's decision to change working conditions triggers a bargaining obligation, and that if it subsequently can be shown that the employer refused to bargain over

[3] Given the court's exclusive reliance on its earlier decision in *Fort Belvoir*, the ensuing discussion of, and the references to, the court's decision below will be a discussion of the court's decision in *Fort Belvoir*.

matters which were properly within that bargaining obligation, an unfair labor practice has been committed. See, *e.g.*, *NLRB* v. *Katz*, 369 U.S. 736 (1962) (private sector); *FLRA* v. *Social Security Administration*, 753 F. 2d 156 (D.C. Cir. 1985); *FLRA* v. *United States Department of the Air Force, Tinker Air Force Base*, 735 F.2d 1513 (D.C. Cir. 1984) (federal sector). Moreover, the court's result is at odds with the Authority's construction of its own enabling act, a construction which continues the practice that existed under the prior Executive Order program.

As this Court stated in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 107 (1983): "In passing the Civil Reform Act, Congress unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest than it had been under the Executive Order regime." It is incorrect to conclude, as the court did below, that Congress intended that an agency assertion of compelling need for an agency regulation, and a meritless one at that, should be allowed to disrupt the bargaining obligation in unilateral change cases when Congress also intended that agency regulations be one of the Statute's least restrictive bars to bargaining. Review by this Court is plainly warranted.

1.a. Under the Statute, not all agency regulations are a bar to bargaining, unlike government-wide regulations for example which are. 5 U.S.C. 7117(a)(1), (2). Only those agency regulations which meet the criteria for compelling need, criteria which Congress has authorized the Authority to prescribe and to apply, can constitute a bar to bargaining. 5 U.S.C.

7117(a)(2),(a)(3).[4] Further, the employing agency carries the burden of demonstrating such a compelling need to the Authority. See 45 Fed. Reg. 3485 (1980). Moreover, the Statute also specifies three circumstances where even a regulation for which there may be a compelling need does not act as a bar to collective bargaining.[5] As a result, agency regulations are

[4] For discussion of a similar bar for agency regulations which met a compelling need test under the preexisting Executive Order program, see 1975 "Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491, as Amended" (1975 Council Report) at 37-40, *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 1304-1311 (Comm. Print No. 96-7) (*Legis. Hist.*). Copies of the 1975 Council Report have been lodged with the Clerk of the Court.

[5] First, if a collective bargaining agreement has a provision with which such a regulation conflicts, it is an unfair labor practice for an agency to enforce either a government-wide or an agency regulation if the agreement was in effect before the date the regulation was prescribed. 5 U.S.C. 7116(a)(7). Second, even if a compelling need could be found for an agency regulation under the Authority's criteria in 5 C.F.R. 2424.11, the Authority is instructed not to find a compelling need if the agency which issued the regulation informs the Authority that a compelling need for the regulation does not exist. 5 U.S.C. 7117(b)(2)(B). (This is in contrast to several of the other bars to bargaining which agency management cannot waive, such as the management rights enumerated in Section 7106(a) of the Statute or the bar to bargaining in Section 7117(a) over proposals inconsistent with other law or with government-wide rules or regulations.) Finally, a regulation for which a compelling need may exist cannot restrict bargaining where the bargaining unit is comprised of a majority of the agency's or, in the case of a regulation issued by a primary national subdivision, the subdivision's employees. 5 U.S.C. 7117(a)(3). See *Association of Civilian Technicians, Montana Air Chapter* v. *FLRA*, 756 F.2d 172, 176-178 (D.C. Cir. 1985).

one of the Statute's least restrictive bars to bargaining. See 124 Cong. Rec. 29199 (1978) (statement of Rep. Ford) ("The compromise position in section 7117 was accepted with the understanding that the compelling need test will be permitted to be raised in only a limited number of cases.").[6]

b. As the Authority stated in its decision in this case (App. 21a), Section 7117(b) of the Statute empowers the Authority to resolve compelling need issues where, during the course of collective bargaining, "an exclusive representative alleges that no compelling need exists for any rule or regulation * * * which is then in effect and which governs any matter at issue in such collective bargaining." 5 U.S.C. 7117(b)(1). Further, as the Authority also noted (App. 22a-23a), the Authority's regulations implementing this provision require that when such a negotiability dispute arises, and when no actual or contemplated changes in conditions of employment are involved, the compelling need issue is resolved through the negotiability procedures in Section 7117 of the Statute and Part 2424 of the Authority's regulations. 5 C.F.R. 2424.5 (App. 10a).

However, a different situation is presented where alleged unilateral changes in conditions of employment are involved. Because the Statute, like the National Labor Relations Act, imposes a "continuing obligation

[6] The burden of demonstrating a compelling need for an agency regulation is a considerable one. *E.g., NAGE Local R14-62 and U.S. Army Dugway Proving Ground, Dugway, Utah*, 26 F.L.R.A. No. 7 (Mar. 6, 1986) (compelling need not found under 2424.11 because demonstration of monetary savings alone is not sufficient to establish that a regulation is essential, as distinguished from helpful or desirable); *AFGE, Local 1928 and Naval Air Development Center, Warminster, Pennsylvania*, 2 F.L.R.A. 451 (1980) (no compelling need found because agency failed to meet the burden necessary to prove a compelling need for its regulation).

to bargain" which "remains throughout the parties' ongoing relationship," (*FLRA* v. *United States Department of the Air Force, Tinker Air Force Base*, 735 F.2d at 1516), it is a basic tenet of labor law that an employer assumes the risk of having breached that bargaining obligation whenever the employer unilaterally changes working conditions without bargaining. Applying this principle, it is well established that if it subsequently can be shown that the employer changed working conditions but refused to bargain over matters which were properly within the bargaining obligation, an unfair labor practice has been committed. See, *e.g.*, *NLRB* v. *Katz*, 369 U.S. 736 (1962) (private sector); *FLRA* v. *Social Security Administration*, 753 F.2d 156 (D. C. Cir. 1985) (federal sector). The Authority's regulations which allow, in unilateral change unfair labor practice cases, resolution of any of the agency's negotiability defenses give effect to this principle.

Nothing in the legislative history indicates a congressional desire to have the Statute depart from this practice in those situations where the employer's particular defense of nonnegotiability involves an assertion that an agency regulation bars bargaining, as opposed to an assertion, for example, that a government-wide regulation or a Section 7106 management right bars bargaining. In fact, the Senate committee report restates the continued applicability of this general duty to bargain in unilateral change situations: "Where agency management proposes to change established personnel policies, the exclusive representative must be given notice of the proposed changes and an opportunity to negotiate over such proposals to the extent they are negotiable."[7]

[7] S. Rep. 95-969, 95th Cong., 2d Sess. 104 (1978), *reprinted in Legis. Hist.* at 764.

In allowing for the unified processing of any compelling need issues raised in a unilateral change unfair labor practice case, the Authority's construction of the Statute also draws support from established Executive Order practice. Under the Executive Order program, the obligation of an agency to negotiate prior to making changes in employee working conditions was discussed in the 1975 Council Report which stated the "[Executive] Order does require adequate notice and an opportunity to negotiate prior to changing established personnel policies and practices and matters affecting working conditions during the term of an existing agreement unless the issues thus raised are controlled by current contractual commitments, or a clear and unmistakable waiver is present." 1975 Council Report at 41, *reprinted in Legis. Hist.* at 1312.

Subsequent to the issuance of the 1975 Council Report, section 11(d) of the Executive Order was amended to specifically authorize the Department of Labor's Assistant Secretary for Labor-Management Relations (the office charged with initially resolving federal sector unfair labor practice complaints under the Executive Order) to decide any negotiability issues necessary to the resolution of such cases even though there may not be existing precedent from the Federal Labor Relations Council (the separate body which heard, among other things, negotiability appeals) to guide the Assistant Secretary. In so doing, section 11(d) provided for the unified processing of negotiability issues in unilateral change unfair labor practice cases.[8] As the Authority's

[8] Section 11(d) provided:

(d) If, as the result of an alleged unilateral change in, or addition to, personnel policies and practices or matters affecting working conditions, the acting party is charged with a refusal

(Continued)

decision in this case pointed out, the 1975 amendments to the Executive Order authorized "precisely what the Authority's procedures, codified at 5 C.F.R. §§ 2423.5 and 2424.5, were promulgated to permit: unified processing of any compelling need negotiability issue in the unfair labor practice proceeding in which it arises" (App.25a) (footnote omitted).

c. The court's decision below, stating principally that the language of Section 7117(a)(2) establishes a "condition precedent" (App.60a), overlooks the principle that, regardless of the nature of an agency's negotiability defense, an agency breaches the "continuing obligation" to bargain whenever it unilaterally changes conditions of employment and, in so doing, refuses to bargain over a matter that subsequently can be shown to have been within the duty to bargain. However, as the Authority stated in its decision (App.24a), neither the Statute nor its legislative history suggests that Congress intended to make an exception in the federal sector to this principle when the agency's defense of nonnegotiability involves the compelling need negotiability issue that is otherwise processed under Section 7117(b) of the Statute.

[Continued]

to consult, confer or negotiate as required under this Order, the Assistant Secretary may, in the exercise of his authority under section 6(a)(4) of the Order, make those determinations of negotiability as may be necessary to resolve the merits of the alleged unfair labor practice. In such cases the party subject to an adverse ruling may appeal the Assistant Secretary's negotiability determination to the Council.

E.O. 11491, as amended, § 11(d), 3 C.F.R. 957 (1971-1975 comp.), *reprinted in Legis. Hist.* at 1336. See also the 1975 Council Report at 46-48, *reprinted in Legis. Hist.* at 1323-1327.

An examination of the legislative history reveals not one comment in a congressional report nor one comment from a member of Congress which supports the court's conclusion.[9] If Congress had intended such a marked departure from basic precepts of labor law, there should be some indication from Congress that such a departure is intended. See *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 103-104, 107 (1983). Given the absence of any legislative history supporting the court's view of the Statute, the conclusion of the court below that the Authority's construction of the Statute is impermissible is simply wrong. See *Chevron* v. *National Resources Defense Council*, 467 U.S. 837, 843 (1984); *Defense Logistics Agency* v. *FLRA*, 754 F.2d 1003, 1013-1014 (D.C. Cir. 1985).

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[9] For example, the conference committee report made no mention of the language of Section 7117(a)(2) as introducing a "condition precedent," so as to alter when the duty to bargain is deemed to arise in unilateral change cases. The conference committee report stated:

> Both the House and Senate authorize negotiations except to the extent inconsistent with law, rules, and regulations (Senate sections 7215(c) and 7218(a); House sections 7103(a)(12)(14) and 7117(a)(1), (2), and (3)). The Senate specifically states that this included policies set forth in the Federal Personnel Manual. The House contains no comparable wording.
>
> The conference report follows the House approach throughout this section and other instances where there are similar differences due to the Senate reference to policies, as well as rules and regulations. The conferees specifically intend, however, that the term "rules or regulations" be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply.

H.R. Rep. 95-1717, 95th Cong., 2d Sess. 158 (1978), *reprinted in Legis. Hist.* at 826.

2. While the court below relied principally upon its reading of the language of Section 7117(a)(2) as disposing of the issue in this case, the court also made several subsidiary conclusions which are plainly erroneous.

a. First, the court stated that Congress' creation of the Section 7117(b) expedited negotiability appeal procedure for resolving assertions that there is a compelling need for an agency regulation demonstrates that Congress rejected the old Executive Order approach, which allowed negotiability defenses, such as an assertion of a compelling need for an agency regulation, to be resolved in unilateral change unfair labor practice cases (App. 64a). Further, the court stated that unified processing would disregard the several features of the 7117(b) procedure which are different from an unfair labor practice proceeding—the 7117(b) procedure is expedited and presented directly to the Authority, the FLRA General Counsel is not a party, and a hearing is discretionary (but if a hearing is held the agency is a necessary party) (App. 67a-68a).

The Statute's creation of the separate Section 7117(b) appeal procedure should not be viewed as a congressional rejection of the Executive Order's unified processing of negotiability defenses in unilateral change unfair labor practice cases. First, the separate and direct negotiability appeal procedure also existed under the Executive Order (see 5 C.F.R. 2411.21-28 (1978), see specifically 5 C.F.R. 2411.22(b), 2411.25(b)(2) (1978)). Obviously, the practice under the Executive Order shows that the existence of this separate procedure was not incompatible with allowing the resolution of such compelling need issues in unilateral change unfair labor practice cases where the agency raises an agency regulation in defense of its failure to bargain. There is no reason to read Congress' continuation of such a separate procedure as a rejection of anything.

Second, the various features in Section 7117(b), which the court states (App.67a-68a) are not present in unfair labor practice proceedings, are, with one exception, also features of the Section 7117(c) procedure for resolving all other kinds of allegations of nonnegotiability.[10] Yet neither Aberdeen nor the court below suggests that the Authority contravenes its Statute when it resolves the negotiability issues (that would otherwise be processed under the Section 7117(c) procedure) when they are raised as defenses in unilateral change unfair labor practice cases.

Finally, regardless whether the Section 7117(b) procedure or the unfair labor practice procedure is used to

[10] Like Section 7117(b), the Section 7117(c) procedure is expedited (7117(c)(6)) and presented directly to the Authority, the FLRA General Counsel is not a party (7117(c)(5)), and a hearing is discretionary (7117(c)(5)). The only difference is that under Section 7117(b) if a hearing is held the agency is a necessary party, whereas there is no mention of the agency being a necessary party to any discretionary hearing held under the Section 7117(c) procedure.

The agency's participation in a Section 7117(b) hearing may have its antecedents in the Executive Order. There, agencies were specifically encouraged to waive the assertions by local management that agency regulations barred bargaining (see 1975 Council Report, *supra*, *reprinted in Legis. Hist.* at 1309-1310). Further, under the Executive Order, to ensure that an agency head had been given notice and an opportunity to waive such an assertion of nonnegotiability, the Council only accepted a compelling need negotiability appeal for processing if the union had specifically asked the agency head for an exception to that particular bar to bargaining and the agency head either did not respond or refused to grant the exception (5 C.F.R. 2411.22(b) (1978)). Under the Statute, the requirement that an agency head be a party to any discretionary hearing under Section 7117(b) similarly ensures that the agency head has an opportunity to waive the regulation as a bar to bargaining (see Section 7117(b)(2)(A)) before the resources involved in holding a hearing are expended.

determine the merits of an assertion of a compelling need for an agency regulation, the outcome of that determination would be the same. In either forum, the merits are decided by the Authority; the agency's burden of proof in demonstrating a compelling need for the regulation is the same (see 45 Fed. Reg. 3485 (1980)); and if a compelling need is found, the agency is under no obligation to bargain over proposals which conflict with the regulation.

b. Second, the court erred in viewing Executive Order 12107 (Dec. 28, 1978), 3 C.F.R. 264 (1979), as buttressing its conclusion that Congress rejected the Executive Order practice of allowing compelling need issues to be resolved in unilateral change unfair labor practice cases (App.66a).

Executive Order 12107 was issued to govern the federal labor management relations program for the 10-day period between January 1, 1979 (the date the Federal Labor Relations Authority came into being as a result of Reorganization Plan No. 2 of 1978)[11] and January 11, 1979 (the date the Statute took effect).[12] Executive Order 12107 was the housekeeping measure which reassigned Executive Order tasks from the expiring Federal Labor Relations Council and from the Assistant Secretary of Labor for Labor-Management Relations to the newly created and single entity, the Federal Labor Relations Authority.[13]

While Executive Order 12107 did not spell out the fact that negotiability issues could be decided as part of unilateral change unfair labor practice cases (as Executive Order 11491, as amended, did in section 6(a)

[11] H. Doc. 95-341, 95th Cong., 2d Sess. (1978), *reprinted in Legis. Hist.* at 630.

[12] Pub. L. No. 95-454, § 907; 92 Stat. 1227 (1978).

[13] H. Rep. 95-1396, 95th Cong., 2d Sess. 5 (1978), *reprinted in Legis. Hist.* at 663.

and section 11(d)), there was no longer a need for the Executive Order to do so. Formerly, under Executive Order 11491, the Assistant Secretary's jurisdiction to resolve negotiability issues in unilateral change unfair labor practice cases was an exception to the Council's initial jurisdiction over all negotiability disputes. See 1975 Council Report, *supra*, *reprinted in Legis. Hist.* at 1324-1327. Therefore, that jurisdiction needed to be spelled out. However, with the advent of Reorganization Plan No. 2, which gave the Authority initial jurisdiction over both negotiability and unfair labor practice disputes, there was no longer any need to specify such separate jurisdictional authority.

c. Third, the court erroneously concluded that the Authority's processing of compelling need issues in unilateral change unfair labor practice cases hamstrings an agency or improperly restricts an agency's flexibility (App. 62a, 69a). There are no drawbacks to such unified processing. When the Authority concludes that an agency's refusal to bargain was justified by an agency regulation for which there is a compelling need, resolving all the issues in one forum obviously does not adversely affect the agency. Furthermore, regardless of whether the compelling need issue is processed as part of appropriate unfair labor practice cases, agencies remain able to issue new regulations and they remain able to enforce, as a bar to collective bargaining, any regulation which Congress intended to bar collective bargaining (*i.e.*, any regulation for which the agency can demonstrate a compelling need).

Thus, in situations where the Authority finds no compelling need for the regulation which prompted the change, the agency is not improperly affected.[14] In this case, for example, Aberdeen was only ordered to

[14] See *Defense Logistics Agency* v. *FLRA*, *supra*, 754 F.2d at 1013.

bargain prospectively and to post appropriate notices.[15] But even an order to rescind a unilateral change over which there was a duty to bargain is simply one well-accepted way in which a breach of the collective bargaining obligation is remedied.[16]

Conversely, it is in the interest of the efficient and effective administration of the Statute that all issues be resolved in the one unfair labor practice proceeding. Unified processing of a compelling need issue in the unfair labor practice case in which it arises is responsive to "concern over duplicative proceedings and delay and prejudice to governmental employees."[17] The dispute resolution process is streamlined and shortened,[18] which effectuates Congress' goal to facilitate and promote the collective bargaining process by providing for the resolution of all relevant issues in one proceeding, thereby obviating the delay inherent in two separate and consecutive proceedings. In addition, employees are afforded a forum, and access to a remedy, that can provide some form of retroactive relief in appropriate cases.

Accordingly, contrary to the conclusion of the court below, unified processing of compelling need issues in unilateral change unfair labor practice cases does not hamstring or improperly restrict the flexibility of an

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[15] The Authority's decision only ordered the agency to bargain, not to agree, on the proposal; the Authority did not decide the merits of the proposal. And, "[i]n collective bargaining, government managers are presumably competent to look out for government interests." *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1157 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

[16] See *Decision on Petition for Amendment of Rules*, 23 F.L.R.A. (No. 57) 405, 406-408 (Sept. 23, 1986), petition for review filed sub nom., *National Labor Relations Board Union, et al.* v. *FLRA*, No. 86-1624 (D.C. Cir. Nov. 17, 1986).

[17] *Defense Logistics Agency* v. *FLRA*, *supra*, 754 F.2d at 1014 (footnote omitted).

[18] *Id.* at 1012.

agency. Instead, the various policy considerations supporting the Authority's construction of the Statute prompted the D.C. Circuit to conclude that the Authority's construction is "not only a permissible reading of the Statute, but also a reasonable one, in the truest sense—namely, that the Authority had good reasons for reading the Statute in that way." 754 F.2d at 1014.

Finally, the conflict the decision below produces with the decision of the D.C. Circuit is especially disruptive. This Court has recognized that Congress, in enacting the National Labor Relations Act, intended that there be "uniform application" of statutory rules and procedures. *Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 490 (1953). Uniformity is at least equally important to federal sector labor management relations, where bargaining units can be nationwide and the scope of the Statute's coverage is worldwide. The obligation of an employer agency to bargain before making changes in employee working conditions should not vary from region to region.

CONCLUSION

The petition for a writ of certiorari should be granted.[19]

Respectfully submitted.

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APRIL 1987

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[19] "I authorize the filing of this petition. Charles Fried, Solicitor General."

APPENDIX A

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE AS AMENDED, 5 U.S.C. §§ 7101-7135 (1982 & Supp. III 1985); AND RELEVANT PORTIONS OF THE REGULATIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY, CHAPTER XIV.

5 U.S.C. 7105(a) provides:

§ 7105. Powers and duties of the Authority

(a) (1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

* * * * *

5 U.S.C. 7116(a) provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * * *

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

* * * * *

5 U.S.C. 7117(a)-(c) provides:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a) (1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are

the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b) (1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a) (3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c) (1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2) (B) of this subsection, the agency shall—

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3) (B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

* * * * *

5 U.S.C. 7123(a)-(b) provides:

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

* * * * *

5 U.S.C. 7134 provides:

§ 7134. Regulations

The Authority, the General Counsel, the Federal Mediation and Conciliation Service, the Assistant Secretary of Labor for Labor Management Relations, and the Panel shall each prescribe rules and regulations to carry out the provisions of this chapter applicable to each of them, respectively. Provisions of subchapter II of chapter 5 of this title shall be applicable to the issuance, revision, or repeal of any such rule or regulation.

5 C.F.R. 2423.5 provides:

§ 2423.5 Selection of the unfair labor practice procedure or the negotiability procedure.

Where a labor organization files an unfair labor practice charge pursuant to this part which involves a negotiability issue, and the labor organization also files pursuant to Part 2424 of this subchapter a petition for review of the same negotiability issue, the Authority and the General Counsel ordinarily will not process the unfair labor practice charge and the petition for review simultaneously. Under such circumstances, the labor organization must select under which procedure to proceed. Upon selection of one procedure, further action under the other procedure will ordinarily be suspended. Such selection must be made regardless of whether the unfair labor practice charge or the petition for review of a negotiability issue is filed first. Notification of this selection must be made in writing at the time that both procedures have been invoked, and must be served on the Authority, the appropriate Regional Director and all parties to both the unfair labor practice case and the negotiability case. Cases which solely involve an agency's allegation that the

duty to bargain in good faith does not extend to the matter proposed to be bargained and which do not involve actual or contemplated changes in conditions of employment may only be filed under Part 2424 of this subchapter.

5 C.F.R. 2424 provides:

PART 2424—EXPEDITED REVIEW OF NEGOTIABILITY ISSUES

Subpart A—Instituting an Appeal

§ 2424.1 Conditions governing review.

The Authority will consider a negotiability issue under the conditions prescribed by 5 U.S.C. 7117 (b) and (c), namely: If an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter proposed to be bargained because, as proposed, the matter is inconsistent with law, rule or regulation, the exclusive representative may appeal the allegation to the Authority when—

(a) It disagrees with the agency's allegation that the matter as proposed to be bargained is inconsistent with any Federal law or any Government-wide rule or regulation; or

(b) It alleges, with regard to any agency rule or regulation asserted by the agency as a bar to negotiations on the matter, as proposed, that:

(1) The rule or regulation violates applicable law, or rule or regulation of appropriate authority outside the agency;

(2) The rule or regulation was not issued by the agency or by any primary national subdivision of the agency, or otherwise is not applicable to bar negotiations with the exclusive representative, under 5 U.S.C. 7117(a)(3); or

(3) No compelling need exists for the rule or regulation to bar negotiations on the matter, as proposed, because the rule or regulation does not meet the criteria established in Subpart B of this part.

§ 2424.2 Who may file a petition.

A petition for review of a negotiability issue may be filed by an exclusive representative which is a party to the negotiations.

§ 2424.3 Time limits for filing.

The time limit for filing a petition for review is fifteen (15) days after the date the agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained is served on the exclusive representative. The exclusive representative shall request such allegation in writing and the agency shall make the allegation in writing and serve a copy on the exclusive representative: *Provided, however,* That review of a negotiability issue may be requested by an exclusive representative under this subpart without a prior written allegation by the agency if the agency has not served such allegation upon the exclusive representative within ten (10) days after the date of the receipt by any agency bargaining representative at the negotiations of a written request for such allegation.

§ 2424.4 Content of petition; service.

(a) A petition for review shall be dated and shall contain the following:

(1) A statement setting forth the express language of the proposal sought to be negotiated as submitted to the agency;

(2) An explicit statement of the meaning attributed to the proposal by the exclusive representative including:

(i) Explanation of terms of art, acronyms, technical language, or any other aspect of the language of the proposal which is not in common usage; and

(ii) Where the proposal is concerned with a particular work situation, or other particular circumstances, a description of the situation or circumstances which will enable the Authority to understand the context in which the proposal is intended to apply:

(3) A copy of all pertinent material, including the agency's allegation in writing that the matter, as proposed, is not within the duty to bargain in good faith, and other relevant documentary material; and

(4) Notification by the petitioning labor organization whether the negotiability issue is also involved in an unfair labor practice charge filed by such labor organization under Part 2423 of this subchapter and pending before the General Counsel.

(b) A copy of the petition including all attachments thereto shall be served on the agency head and on the principal agency bargaining representative at the negotiations.

(c)(1) Filing an incomplete petition for review will result in the exclusive representative's being asked to provide the missing or incomplete information. Noncompliance with a request to complete the record may result in dismissal of the petition.

(2) The processing priority accorded to an incomplete petition, relative to other pending negotiability appeals, will be based upon the date when the petition is completed—not the date it was originally filed.

§ 2424.5 Selection of the unfair labor practice procedure or the negotiability procedure.

Where a labor organization files an unfair labor practice charge pursuant to Part 2423 of this subchapter which involves a negotiability issue, and the labor organization also files pursuant to this part a petition for review of the same negotiability issue, the Authority and the General Counsel ordinarily will not process the unfair labor practice charge and the petition for review simultaneously. Under such circumstances, the labor organization must select under which procedure to proceed. Upon selection of one procedure, further action under the other procedure will ordinarily be suspended. Such selection must be made regardless of whether the unfair labor practice charge or the petition for review of a negotiability issue is filed first. Notification of this selection must be made in writing at the time that both procedures have been invoked, and must be served on the Authority, the appropriate Regional Director and all parties to both the unfair labor practice case and the negotiability case. Cases which solely involve an agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained and which do not involve actual or contemplated changes in conditions of employment may only be filed under this part.

§ 2424.6 Position of the agency; time limits for filing; service.

(a) Within thirty (30) days after the date of the receipt by the head of an agency of a copy of a petition for review of a negotiability issue the agency shall file a statement—

(1) Withdrawing the allegation that the duty to bargain in good faith does not extend to the matter proposed to be negotiated; or

(2) Setting forth in full its position on any matters relevant to the petition which it wishes the Authority to consider in reaching its decision, including a full and detailed statement of its reasons supporting the allegation. The statement shall cite the section of any law, rule or regulation relied upon as a basis for the allegation and shall contain a copy of any internal agency rule or regulation so relied upon. The statement shall include:

(i) Explanation of the meaning the agency attributes to the proposal as a whole, including any terms of art, acronyms, technical language or any other aspect of the language of the proposal which is not in common usage; and

(ii) Description of a particular work situation, or other particular circumstance the agency views the proposal to concern, which will enable the Authority to understand the context in which the proposal is considered to apply by the agency.

(b) A copy of the agency's statement of position, including all attachments thereto shall be served on the exclusive representative.

§ 2424.7 Response of the exclusive representative; time limits for filing; service.

(a) Within fifteen (15) days after the date of the receipt by an exclusive representative of a copy of an agency's statement of position the exclusive representative shall file a full and detailed response stating its position and reasons for:

(1) Disagreeing with the agency's allegation that the matter, as proposed to be negotiated, is inconsistent with any Federal law or Government-wide rule or regulation; or

(2) Alleging that the agency's rules or regulations violate applicable law, or rule or regulation or

appropriate authority outside the agency; that the rules or regulations were not issued by the agency or by any primary national subdivision of the agency, or otherwise are not applicable to bar negotiations under 5 U.S.C. 7117(a)(3); or that no compelling need exists for the rules or regulations to bar negotiations.

(b) The response shall cite the particular section of any law, rule or regulation alleged to be violated by the agency's rules or regulations; or shall explain the gounds for contending the agency rules or regulations are not applicable to bar negotiations under 5 U.S.C. 7117(a)(3), or fail to meet the criteria established in Subpart B of this part or were not issued at the agency headquarters level or at the level of a primary national subdivision.

(c) A copy of the response of the exclusive representative including all attachments thereto shall be served on the agency head and on the agency's representative of record in the proceeding before the Authority.

§ 2424.8 Additional submissions to the Authority.

The Authority will not consider any submission filed by any party, whether supplemental or responsive in nature, other than those authorized under §§ 2424.2 through 2424.7 unless such submission is requested by the Authority; or unless, upon written request by any party, a copy of which is served on all other parties, the Authority in its discretion grants permission to file such submission.

§ 2424.9 Hearing.

A hearing may be held, in the discretion of the Authority, before a determination is made under 5 U.S.C. 7117(b) or (c). If a hearing is held, it shall be

expedited to the extent practicable and shall not include the General Counsel as a party.

§ 2424.10 Record not sufficient, optional procedures.

If, in the judgment of the Authority or its designee, the record created by the parties in any appeal instituted pursuant to this subpart is not of sufficient quality to enable it to expeditiously reach a reasoned decision, the Authority may follow one or both of the following procedures in order to further the policy of resolving all negotiability issues as expeditiously as practicable:

(a) Meet with the parties, if they consent to discuss the voluntary settlement of any or all issues involved in the appeal;

(b) Hold a hearing, pursuant to § 2424.9 of the Rules and Regulations, for the purpose of augmenting the record as to any matter which would facilitate dismissal or resolution of the appeal, including requiring oral argument by the parties concerning the substantive issues raised in the appeal.

§ 2424.10a Authority decision and order; compliance.

(a) Subject to the requirements of this subpart the Authority shall expedite proceedings under this part to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

(b) If the Authority finds that the duty to bargain extends to the matter proposed to be bargained, the decision of the Authority shall include an order that the agency shall upon request (or as otherwise agreed to by the parties) bargain concerning such matter. If the

Authority finds that the duty to bargain does not extend to the matter proposed to be negotiated, the Authority shall so state and issue an order dismissing the petition for review of the negotiability issue. If the Authority finds that the duty to bargain extends to the matter proposed to be bargained only at the election of the agency, the Authority shall so state and issue an order dismissing the petition for review of the negotiability issue.

(c) When an order is issued as provided in paragraph (b) of this section, the agency or exclusive representative shall report to the appropriate Regional Director within a specified period failure to comply with an order that the agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the disputed matter. If the Authority finds such a failure to comply with its order, the Authority shall take whatever action it deems necessary, including enforcement under 5 U.S.C. 7123(b).

Subpart B—Criteria for Determining Compelling Need for Agency Rules and Regulations

§ 2424.11 Illustrative criteria.

A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.

(b) The rule or regulation is necessary to insure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-2577

Aberdeen Proving Ground
Department of the Army,

Petitioner,

versus

Federal Labor Relations Authority,

Respondent.

January 28, 1987

ORDER

Upon consideration of the motion of petitioner, Aberdeen Proving Ground Department of the Army, for summary reversal of the authorities' decision and order, and summary denial of the FLRA's cross-petition,

IT IS ORDERED that the motion is granted on the authority of *U.S, Army Engineer Ctr., Fort Belvoir* v. *FLRA*, 762 F.2d 409 (4th Cir. 1985).

Entered at the direction of Judge Phillips with the concurrence of Judge Ervin and Judge Chapman.

For the Court,

JOHN M. GREACEN
CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-2577

Aberdeen Proving Ground
Department of the Army,

Petitioner,

versus

Federal Labor Relations Authority,

Respondent.

January 5, 1987

ORDER

The respondent's motion for suggestion for hearing in banc was submitted to this Court. In a poll of the Court on the motion for initial hearing in banc, all the judges voted to deny the motion.

Entered at the direction of Chief Judge Winter.

For the Court,

JOHN M. GREACEN
CLERK

21 FLRA No. 100

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

No. 3-CA-20077

Aberdeen Proving Ground
Department of the Army

Respondent

and

International Association of
Machinists and Aerospace
Local Lodge 2424, AFL-CIO

Charging Party

DECISION AND ORDER

I. STATEMENT OF THE CASE

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the General Counsel. The Respondent filed an opposition to the General Counsel's exceptions. The complaint in this case alleged a violation of section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) when the Respondent refused to negotiate on the Charging Party's proposal to grant administrative leave rather than "forced annual leave" on the day after Thanksgiving when Respondent's operations would be closed.

II. BACKGROUND

Aberdeen Proving Ground, Department of the Army (Respondent), met on September 15, 1981, with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO (the Union), and informed the Union of its decision to curtail operations of the Aberdeen Proving Ground on the day after Thanksgiving, and that employees would be placed on "forced annual leave" for that day. The Union sought to negotiate concerning the impact of the Respondent's decision to curtail its operations and the procedures leading to its implementation.

During negotiations held in October, the Union presented, among other things, two proposals to grant administrative leave to all employees during the closure of the Respondent's operations on the day after Thanksgiving, rather than, as decided by the Respondent, to place employees on forced annual leave. The Respondent refused to bargain on these proposals, stating that Department of Defense (DOD) and Department of the Army (DA) regulations precluded a grant of administrative leave for an anticipated closure of operations. The negotiating session ended shortly thereafter. The following day, and again a few days before Thanksgiving, the Respondent offered to negotiate with the Union on procedures and appropriate arrangements concerning the upcoming closure but the Union declined.

III. JUDGE'S DECISION

The Judge concluded that the Respondent had no duty to bargain over the Union's proposal regarding the granting of administrative leave because the subject of the Union's proposal was inconsistent with

Agency regulations which specifically barred administrative leave for an anticipated curtailment of operations and the Authority had not previously determined that there was no compelling need for the conflicting regulation.

The granting of administrative leave to unit employees in connection with the temporary curtailment of agency operations is a negotiable matter affecting working conditions of unit employees. *See Long Beach Naval Shipyard, Long Beach, California and International Federation of Professional and Technical Engineers, Local 174, AFL-CIO*, 7 FLRA 362 (1981). The Judge noted this decision, but dismissed the complaint because the Authority had not yet determined that no compelling need existed for the DOD and DA regulations upon which the Respondent specifically relied.

IV. POSITIONS OF THE PARTIES

Exceptions to the Judge's findings and conclusions were filed by the General Counsel concerning the issue of compelling need for the DOD and DA regulations which were raised as a bar to negotiations on the Union's proposal for administrative leave. The General Counsel contended that the question of compelling need for an agency regulation may be raised as part of an unfair labor practice proceeding, and that when the Respondent in this case asserted a compelling need for its regulations it had the burden of establishing this assertion before the Judge. The General Counsel argued that the Respondent did not meet the burden of establishing compelling need for the regulations and as a consequence violated section 7116(a)(1) and (5) of the Statute. The General Counsel also excepted to certain credibility resolutions made by the Judge.

In its opposition to the General Counsel's exceptions, the Respondent contended that it had no duty to establish a compelling need for its regulations without the issue having been raised by the Union under the Authority's negotiability procedures. Moreover, although continuing to agree with the Judge that compelling need must be determined in a separate proceeding, the Respondent asserts that a compelling need existed for the regulations in question on the grounds that the regulations, which precluded a grant of administrative leave under the circumstances, are essential to the accomplishment of the stated objective of curtailing operations on the day in question in order to conserve energy. Further, the Respondent asserts in its opposition that compelling need was established at the hearing.

V. ANALYSIS

Section 7117(b) of the Statute empowers the Authority to resolve compelling need issues where, during the course of collective bargaining, "an exclusive representative alleges that no compelling need exists for any rule or regulation . . . which is then in effect and which governs any matter at issue in such collective bargaining . . . ." Subsequent to the Judge's Decision, the Authority issued *Defense Logistics Agency (Cameron Station, Virginia)*, 12 FLRA 412 (1983), *affirmed sub nom. Defense Logistics Agency, et al.* v. *FLRA*,

754 F.2d 1003 (D.C. Cir. 1985),[1] where it was concluded that issues relating to whether there exists a compelling need for an agency regulation so as to bar negotiations on inconsistent proposals appropriately may be raised and decided in an unfair labor practice proceeding when the agency raises compelling need as an affirmative defense in such an unfair labor practice proceeding.[2]

As indicated in *Defense Logistics Agency*, when an agency refuses to bargain over a union proposal during ongoing collective bargaining negotiations because the proposal is alleged to be inconsistent with existing agency-wide regulation for which a compelling need

[1] The court remanded the matter to the Authority for the sole purpose of permitting the petitioners to present evidence as to whether or not there existed a compelling need for the particular regulation at issue. On April 22, 1985, the Authority remanded the proceeding to the Chief Administrative Law Judge for disposition consistent with the direction of the court. Thereafter, on March 31, 1986, the complaint was withdrawn. In the instant case, by contrast, as the Respondent asserts that compelling need was established at the hearing as well as that compelling need must be determined in a separate proceeding, the Authority concludes that the Respondent was permitted to present evidence as to whether or not there existed a compelling need for the regulations at issue.

[2] The Authority notes that the United States Court of Appeals for the Fourth Circuit recently reversed an Authority decision on this same issue, *U.S. Army Engineer Center and Fort Belvoir*, 13 FLRA 707 (1984), *reversed sub nom. United States Army Engineer Center* v. *FLRA*, 762 F.2d 409 (4th Cir. 1985), *rehearing denied* (July 26, 1985). In the Authority's Supplemental Decision and Order in that case, *U.S. Army Engineer Center and Fort Belvoir*, 19 FLRA No. 92 (1985), the Authority stated it "accepts the Court's opinion as the law of the case and, consistent with that opinion, shall order that the complaint in Case No. 3-CA-20133 be dismissed." Slip op. at 2.

exists, section 7117 of the Statute requires that the issue be resolved through the procedures in section 7117 of the Statute and Part 2424 of the Authority's Rules and Regulations. A different situation is presented in cases of disputes involving an agency's alleged unilateral changes in conditions of employment, where issues of negotiability—including, as in the instant case, assertions of compelling need for agency regulations—are raised as affirmative defenses. To resolve such disputes, the Authority has promulgated procedures (5 C.F.R. §§ 2423.5 and 2424.5) which recognize a union's right either: (1) to seek resolution of the entire dispute, including the negotiability issues, in the unfair labor practice forum; or (2) to seek initial and separate resolution of the negotiability issues in the negotiability appeal forum.

It is a well-established principle in both private sector and federal sector labor law that an employer's unilateral change in what subsequently can be shown to be a bargainable working condition violates the bargaining obligation and constitutes an unfair labor practice. *See NLRB* v. *Katz*, 369 U.S. 736 (1962) (private sector); *FLRA* v. *United States Department of the Air Force, Tinker Air Force Base*, 735 F.2d 1513 (D.C. Cir. 1984) (federal sector). In such cases, one of the defenses available to management is that the substance of the change is nonnegotiable. In the Authority's view, allowing the resolution of compelling need issues in an unfair labor practice proceeding where the issue was raised as a defense to the unfair labor practice charge, is supported by the Statute, its legislative history, and public policy. It is not disputed that when such a defense of nonnegotiability concerns the kind of negotiability issue that is otherwise processed under the section 7117(c)

procedure, that defense can be resolved as part of the unfair labor practice case.[3] Neither the Statute nor its legislative history suggests that Congress intended to make an exception in the federal sector to this principle when the defense of nonnegotiability involves the kind of negotiability issue that is otherwise processed under the section 7117(b) procedure.

Section 7117(b)(1) of the Statute states, in part, that "[i] n any case of *collective bargaining* in which an exclusive representative alleges that no compelling need exists for any rule . . . *which is then in effect* and which governs any matter at issue *in such collective bargaining*, the Authority shall determine . . . whether such a compelling need exists." (Emphasis added.) The underscored language reveals that the section 7117(b) procedure is tailored to apply to situations where, during ongoing negotiations, an agency asserts that a proposal is nonnegotiable because it is inconsistent with an existing agency regulation for which there is a compelling need. This language of the Statute does not preclude the Authority from resolving any necessary negotiability issues, including those related to the compelling need for an agency regulation, in a unilateral change unfair labor practice case.

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[3] Indeed, the Authority often has made negotiability determinations in unfair labor practice proceedings where necessary to resolve the allegations that unlawful unilateral changes in working conditions were made in violation of the duty to bargain in good faith. *See, e.g., Department of Transportation*, 19 FLRA No. 1 (1985), *petition for review filed sub nom. American Federation of Government Employees, Local 2747* v. *FLRA*, No. 85-1561 (D.C. Cir. September 9, 1985); *Immigration and Naturalization Service, Eastern Regional Office (Burlington, Vermont)*, 18 FLRA No. 103 (1985); *Department of Health and Human Services, Social Security Administration*, 10 FLRA 77 (1982); *Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma*, 8 FLRA 740 (1982), *enforced sub nom. FLRA* v. *United States Dept. of the Air Force*, 735 F.2d 1513 (D.C. Cir. 1984).

An examination of the legislative history of the Statute supports the Authority's conclusion. Thus, the 1975 amendments to the pre-Statute labor-management relations program, Executive Order 11491, authorized precisely what the Authority's procedures, codified at 5 C.F.R. §§ 2423.5 and 2424.5, were promulgated to permit: unified processing of any compelling need negotiability issue in the unfair labor practice proceeding in which it arises.[4] The enactment of the Statute in 1978 did not indicate a congressional intent to reject the continuation of this well-established practice. Rather, as the United States Court of Appeals for the District of Columbia Circuit found, Congress did not intend to change the existing practice of allowing all issues to be resolved in one proceeding. *See Defense Logistics Agency v. FLRA*, 754 F.2d 1003, 1008-1011 (D.C. Cir. 1985).

In the Authority's view, there is substantial public policy benefit from unified processing of a "compelling need" allegation as part of the unfair labor practice case involving unilateral change, where such an allegation of nonnegotiability arises as an affirmative defense. This procedure effectuates Congress' goal to facilitate and promote the collective bargaining process by providing for the resolution of all relevant issues in one proceeding, thereby obviating the delay inherent in two separate and consecutive proceedings. Moreover, whether an agency's change is found to be nonnegotiable because there is a compelling need for the

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[4] *See* the 1975 "Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491, as Amended," *reprinted in* Subcom. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Service, 96th Cong. 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 1304-1311, 1312-1314, 1323-1326.

agency regulation or negotiable because there is no compelling need for the regulation which prompted the change, the agency is not improperly adversely affected. Even if the Authority determines that the purposes and policies of the Statute are best effectuated by an order rescinding a unilateral change over which there was a duty to bargain, such a result would only deprive the agency of the results of a unilateral change it should not have made without first bargaining.

The D.C. Circuit has noted agreement with the Authority's practice of allowing negotiability issues—including, as in the instant case, assertions of compelling need for agency regulations—to be resolved in an unfair labor practice proceeding. It concluded a review of the Statute and its legislative history as well as the Authority's policy arguments by stating:

> . . . We think it is clear that the Authority's distinction between ongoing negotiations and unilateral changes reflects not only a permissible reading of the Statute, but also a reasonable one, in the truest sense—namely, that the Authority had good reasons for reading the Statute in that way . . . . We therefore hold that in ULP proceedings over alleged unilateral changes in employment conditions effected by agency-wide rule, the Authority may determine whether there was a compelling need for the rule, and thus whether the rule was negotiable without first having made such a determination pursuant to § 7117(b). *Defense Logistics Agency, et al.*, 754 F.2d at 1014.

In sum, the Authority, consonant with the holding of the D.C. Circuit quoted above, reaffirms its finding that unified processing of a "compelling need" allegation as part of the unilateral change unfair labor practice case in which such an allegation of nonnegotiability arises as an affirmative defense is appropriate.

The Authority in this case concludes that the Respondent has failed to sustain its burden of establishing a compelling need for the DOD and DA regulations in accordance with criteria in section 2424.11 of the Authority's Rules and Regulations (5 C.F.R. § 2424.11 (1981)). As noted, the Respondent argues that there is a compelling need for the regulations because they are essential to meet its objective in curtailing operations, which was to conserve energy. However, the Respondent has failed to establish a nexus between its goal of conserving energy and the regulations in question.[5] The record is barren of evidence which would demonstrate how the granting of administrative leave to unit employees, rather than annual leave, as the Union's proposal at issue here would require, in any way affects the Respondent's stated objective of conserving energy; operations would be curtailed to the same extent, and energy conserved to the same extent, whether the employees affected were on annual leave or administrative leave on the day in question. Therefore, the Respondent has failed to demonstrate how the regulations in question would be essential or

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[5] *Compare National Association of Government Employees, Local R14-62 and U.S. Army Dugway Proving Ground, Dugway, Utah*, 18 FLRA No. 38 (1985), *petition for review filed sub nom. National Association of Government Employees, Local R14-62 v. FLRA*, No. 85-2098 (10th Cir. July 23, 1985), *and National Association of Government Employees, Local R14-9 and U.S. Army Dugway Proving Ground, Dugway, Utah*, 18 FLRA No. 45 (1985), where the Authority found nonnegotiable a union proposal requiring that employees be placed on administrative leave without charge to annual leave during a partial closing. In those cases, unlike here, the agency demonstrated that its regulations prohibiting administrative leave during a partial closing were critical components of the agency's objective of saving money by curtailing operations so as to ensure the agency's performance of its mission in an effective and efficient manner.

or even helpful to achieving the Agency's stated objective in curtailing operations.

VI. CONCLUSION

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision and the entire record in this case, and, contrary to the Judge, concludes that the Respondent violated section 7116(a)(1) and (5) of the Statute when it refused to bargain concerning the Union's proposal to grant employees administrative leave on the day after Thanksgiving, submitted in response to the Respondent's notice that operations would be curtailed on that date. Therefore, the Authority adopts the Judge's findings and conclusions only to the extent consistent with this decision.[6]

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered

[6]The General Counsel excepted to certain credibility findings made by the Judge. The demeanor of the witnesses is a factor of consequence in resolving issues of credibility, and the Judge has had the advantage of observing the witnesses while they testified. The Authority will not overrule a Judge's resolution with respect to credibility unless a clear preponderance of all relevant evidence demonstrates that such resolution is incorrect. The Authority has examined the record carefully, and finds no basis for reversing the Judge's credibility findings.

that the Aberdeen Proving Ground, Department of the Army shall:

1. Cease and desist from:

(a) Failing or refusing to negotiate with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO, the exclusive representative of a unit of its employees, concerning the Union's proposal to grant administrative leave in lieu of forced annual leave for its unit employees in connection with the closure of the operations of the Aberdeen Proving Ground, Department of the Army, on November 27, 1981.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, negotiate with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO, the exclusive representative of a unit of its employees, concerning the Union's proposal to grant administrative leave in lieu of forced annual leave for its unit employees in connection with the closure of the operations of the Aberdeen Proving Ground, Department of the Army, on November 27, 1981.

(b) Post at its facility, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Aberdeen Proving Ground, Department of the Army, or a designee, and shall be maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to

insure that said Notices are not altered, defaced or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 14, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier, III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to negotiate with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO, the exclusive representative of a unit of our employees, concerning the Union's proposal to grant administrative leave in lieu of forced annual leave for unit employees in connection with the closure of the operations of the Aberdeen Proving Ground, Department of the Army, on November 27, 1981.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, negotiate with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO, the exclusive representative of a unit of our employees, concerning the Union's proposal to grant administrative leave in lieu of forced annual leave for unit employees in

connection with the closure of the operations of the Aberdeen Proving Ground, Department of the Army, on November 27, 1981.

_____
(Activity)

Dated: _____ By: _____
(Signature) Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, NW., 7th Floor (P.0. Box 33758), Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

OALJ-82-91

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

Department of the Army
Aberdeen Proving Ground

Respondent

and Case No. 3-CA-20077

International Association of
Machinists and Aerospace Workers,
Local Lodge 2424, AFL-CIO

Charging Party

Laura Rothenberg, Esquire
For the Respondent

Donna M. DiTullio, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et seq.*[1], and

[1]For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., Section 7116(a)(5) will be referred to, simply, as "16(a)(5)".

the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, *et seq.*, which concerns the alleged refusal to bargain in good faith on the Union's proposal that administrative leave be granted for the Friday following Thanksgiving Day in response to Respondent's decision to close Aberdeen Proving Ground on Friday, November 27, 1981, was initiated by a charge filed on October 27, 1981 (G.C. Exh. 1(a)) which alleged violation of §§ 16(a)(1), (2), (3), (5) and (8) of the Statute. The Complaint and Notice of Hearing issued on February 26, 1982 (G.C. Exh. (c)) and the Complaint alleged violation only of §§ 16(a)(1) and (5) of the Statute. Pursuant to the Notice of Hearing, a hearing was duly held on April 6, 1982, at Aberdeen Proving Ground, Maryland, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and were afforded opportunity to present oral argument, which right both parties waived. At the close of the hearing, May 6, 1982, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, for good cause shown, to May 13, 1982. Counsel for each party timely mailed a helpful brief, received on, or before May 12, 1982, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

FINDINGS

1. Respondent, to conserve energy, on September 14, 1981, decided to close operations of the Aberdeen Proving Grounds on November 27, 28, and 29, 1981. As most employees work only Monday through Friday,

as a practical matter, this meant that Aberdeen Proving Ground (hereinafter also referred to as "APG") would be closed on the Friday after Thanksgiving except for operation of utilities, security and essential activities. Mr. David R. Weppner, Labor Relations Specialist for Respondent, called all of the unions on September 14 and arranged a meeting for the following day, September 15. Mr. Weppner and his superior, Mr. Franklin M. Bradley, Chief of the Management Employee Relations Division, met with representatives of the various unions, including Messrs. Joseph McDeshen, Jr., President, and Harvey W. Mitchell, Vice President of the International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO, (hereinafter also referred to as "IAM"), and informed the Unions that the decision had been made to curtail operations. Respondent advised the Unions that APG employees would be placed on "forced annual leave" (Tr. 58). There are various tenant activities housed at APG, such as the Chemical Systems Laboratory and the Ballistic Research Laboratory, which are not under the command or direction of APG, and the different assurances given by their commanders were discussed. Respondent stated that it was aware that because of the nature of their missions, experiments and tests in progress, that the policy of certain tenant activities might differ (Tr. 59-60), but that Respondent had concluded that APG's tests could be held in abeyance without impairment of its mission (Tr. 60).

2. Following the meeting of September 15, at which the Unions, including IAM, were informed of the decision to close APG on Friday, November 27, 1981,

Colonel William E. Watts, Commander of APG, by letter dated September 23, 1981, advised Mr. McDeshen in writing, in part, as follows:

> "1. I have decided, after due consideration, to close Aberdeen Proving Ground on Friday, 27 November 1981. Only essential post services will continue to function.
>
> . . .
>
> "4. Specific details and clarification concerning the policy of leave for civilian and military personnel will be published shortly" (G.C. Exh. 2).

3. On October 2, 1981, Colonel Watts issued guidelines on how leave would be used for the Thanksgiving curtailment of activities (G.C. Exh. 3) which was distributed, *inter alia*, to the unions, including IAM.

4. A special meeting of Area Energy Resources Conservation Officers was held on October 6, 1981, to discuss leave procedures to be used for the period of the closure. IAM was represented by five individuals, including Mes: rs. McDeshen and Mitchell (Res. Exh. 2, Tr. 64). Colonel Robert P. Jones, who chaired the meeting, reviewed the October 2 letter (G.C. Exh. 3) and pointed out that:

> ". . . civilian employees will take annual leave if they have it accrued. If not, and leave can be accrued by the end of the year, they may be given advanced leave. If they have compensatory time, this can be taken. They may also elect to take leave without pay. If an employee has no annual leave, the individual will be allowed to work" (Res. Exh. 2; see, also, G.C. Exh. 3).

One or more of the union representatives requested that administrative leave be granted and Mr. Weppner responded, in part, that,

> ". . . administrative leave cannot be authorized. Administrative dismissal without charge to leave is only appropriate for unanticipated situations, or for brief periods of time" (Res. Exh. 2, Tr. 65).

5. After the Energy Resources meeting, Mr. Weppner on October 6, 1981, prepared a memorandum, signed by Mr. William J. Foland, Civilian Personnel Officer, addressed to the various Union Presidents, including IAM, which referred to the Letters of September 23 and October 2, and also attached an additional copy of the October 2 letter, which stated, in part, as follows:

> ". . .
> "2. This officially transmits Inclosure 1 [October 2, 1981, letter]. . . so that management can meet its obligation under Title VII of Public Law 95-454 to negotiate concerning the impact and implementation of this decision.
>
> . . .
>
> "4. To effect the post-wide curtailment of operations, all employees not required to work on Friday, 27 November 1981, the day after the Federal holiday, must be placed on annual leave. Because the closure is anticipated and entirely within the control of management, there is no basis to dismiss employees without charge to leave or loss of pay as could be done for an unforeseen event.
>
> . . .
>
> "6. Any union desiring to negotiate concerning impact and implementation of this decision is invited to do so. . . ." (Res. Exh. 1).

6. By letter dated October 6, 1981, IAM requested negotiations stating, in part, as follows:

> "We have received your decision to close on 27 November 1981.
>
> "We again request to negotiate the impact of your decision. . . ." (G.C. Exh. 4, Res. Exh. 3; Tr. 19).

7. Negotiations were held on October 19, 1981. Chief spokesman for Respondent was Mr. Weppner; and IAM was represented by its negotiating team consisting of Mr. McDeshen, Chief spokesman, Mr. Mitchell, Vice President, Mr. Arnold Hughes, Chief Steward, Mr. Bill Brooks, Mr. Sam Cannizzaro and Ms. Marvel Trusclair (Tr. 21, 72). Mr. Weppner outlined "where we were, why we were together" (Tr. 22, 72) and Mr. McDeshen "suggested to Mr. Weppner that in lieu of that, that all employees be put on administrative leave" (Tr. 22). Mr Weppner responded that "the rules and regulations . . . do not permit him to do this and that it verges on nonnegotiability in his opinion" (Tr. 23). Mr. McDeshen then suggested that "if he would not buy my proposal of eight hours of administrative leave, then we would split it with him" by which he meant that "if management would grant four hours administrative leave that we would take, we being the employees, would take four hours anual (sic) leave, split the difference, four and four, four hours annual leave, four hours administrative leave" (Tr. 23). Mr. McDeshen testified that Mr. Weppner's response,

> ". . . was the same as the first, that it was not permitted by rules, laws and regulations and that it was out of the question and out of hand. Also, that it would create a holiday for both proposals . . .
>
> . . .

> "A. An extra holiday. The FPM's state something to that effect that you will not grant a date off to create another holiday" (Tr. 23-24).

8. Mr. Weppner had no recollection of any proposal by IAM for four hours administrative leave (Tr. 85-86). Mr. Weppner testified that after the IAM made its proposal for administrative leave (Tr. 72), which was not a new idea but had been discussed on October 6 and again on October 15 when Mr. Weppner met with Messrs. McDeshen and Mitchell (Tr. 45), and which he rejected for the same reasons he had previously stated (Tr. 74), IAM then made two further oral proposals. One that employees who had no annual leave be advanced leave; and the other was that those who had no annual leave at all be allowed to work; to which he had responded that that was what Respondent had proposed, namely "that people who had no leave as of the 27*th* of November would be advanced leave from a period to December . . . that anyone who had used their total leave accrual for the whole year . . . that we had at least 15 opportunities to work 15 persons. . . ." (Tr. 83).

9. Following a caucus, IAM presented a written proposal, prepared by Mr. Mitchell (Tr. 47), as follows:

> "To provide employees *who desire* to work be permitted to do so and that those who work be provided all the rights as per the negotiated agreement" (G.C. Exh. 5).

Mr. Weppner testified that he caucused with his team and when they reconvened he rejected the IAM proposal because it was too broadly written, "we would have no idea how many people would show up, when they would go to work. I was concerned about safety of those who might be working alone . . . about the buildings, which ones to open, which ones weren't going to be used . . . And I started to

give these reasons to Mr. McDeshen and he said . . . The commander has made his decision. There is no sense in talking anymore. We are leaving . . . I said I felt that was inappropriate. So the union walked out. . . ." (Tr. 87).

Mr. Weppner stated that he spoke further to Mr. McDeshen in the hallway and asked "Is there any need to get together this afternoon. He indicated no" (Tr. 88). After lunch Mr. Weppner called Mr. McDeshen and, again, Mr. McDeshen declined to come back on the afternoon" (Tr. 88). Finally, on the following day, October 20, Mr. Weppner called Mr. McDeshen and "again he felt that there would be no further need to get together. . . ." (Tr. 88).

10. Mr. McDeshen substantially agreed with Mr. Weppner but his emphasis was somewhat different. Thus, he testified. in part, as follows:

> "Q. What if anything was management's response to your written proposal?
> "A. Their response was they rejected it totally out of hand, unacceptable.
> "Q. Was a reason given?
> "A. The reason given was that if they permitted employees to work it would defeat the whole purpose of the post closure for saving energy.
> "Q. What if anything happened after management rejected the third proposal?
> "A. After they rejected that proposal, it was getting close to lunch time and I reminded Dave Weppner of the time. He asked me was there any sense in my opinion for us to reconvene after lunch at one o'clock.
> "Q. What did you respond?

> "A. I asked him if he would come off of his position of the letter of October 2 guidelines where (sic) that he would close, he was not permitting anyone to work. He said no, he cannot change that decision. The decision has been made. And therefore he can not change it. So I said, well, I see no sense in us reconvening after lunch. He says he agrees and we broke at that time off negotiations" (Tr. 26).

Mr. McDeshen admitted that Mr. Weppner had said that if any employees had no leave, "they would find work for them somewhere and he said he was speaking of maybe 15 employees" (Tr. 42).

11. There is no dispute that at a negotiating session held on November 24, 1981, with respect to a similar closing of APG on December 24 and December 31, 1981, IAM refused to bargain about the November 27 closing of APG because "we had filed a ULP" (Tr. 41) and when asked if he would discuss the Thanksgiving closing at the November 24 meeting. Mr. McDeshen said, "No. I would not" (Tr. 41). Mr. Weppner testified that Mr. William Layman, IAM Grand Lodge Representative, who attended the November 24 meeting, had stated "we refuse to negotiate because we have this unfair labor practice charge pending" (Tr. 98).

12. The December 24 and 31 closing of APG is not in issue; however, General Counsel does assert that Respondent agreed to IAM's October 19 written proposal (G.C. Exh. 5) in December. On November 4, 1981, Respondent issued notice of its decision to curtail operations on December 24 and 31, 1981 (Res. Exh. 7) and the guidelines were substantially the same as those issued on October 2, 1981 (G.C. Exh. 3) for November 27, 1981 except as noted hereinafter; various proposals

were submitted (G.C. Exhs. 7, 8, 9, and 10); but the ultimate agreement was as follows:

> "1. Liberal Leave Policy.
> "2. For those who work the terms of the agreement be upheld commensurate with the purpose of achieving energy savings." (G.C. Exh. 11).

CONCLUSIONS

There is no dispute that Respondent, on October 19, 1981, rejected IAM's proposal for administrative leave. Indeed, on October 6 Respondent had stated that under Army Regulations, etc., administrative leave could not be granted for the reason that closure of APG was an anticipated and planned closing. This was repeated at a meeting held on October 15 with Messrs. McDeshen and Mitchell at which time copies of various regulations and a Comptroller General's decision was given to them; and on October 19, 1981, Mr. Weppner once more stated that administrative leave could not be granted under Army Regulation CPR 990-2 (C14), 610.53 (Res. Exh. 6) and Department of Defense Regulation 1400.25-M, CPM 990-2, 610.3 (Res. Exh. 4). CPR 990-2 provides, in part, as follows:

> "S3-2. *Relieving Daily, Hourly, or Piecework Employees from Duty*
>
> . . .
>
> "c. Where advance notice can be given. The Authority to excuse employees administratively is not to be used in instances where the period of interrupted or suspended operations can be anticipated sufficiently in advance to permit arranging for assignment to other work or the scheduling of annual leave. Normally, where 24 hours' advance notice can be given, employees who cannot be assigned to other work must be placed on annual leave with or without their consent." (Res. Exh. 6).

DOD Regulation 1400.25-M provides, in part, as follows:

> "S3-1 . . .
> "d. *Limitation on Authority to Dismiss Employees Without Change to Leave*
>
> . . .
>
> "(2) When, because of planned management reasons, the closing of all or part of an activity is required for short periods of time, employees will be notified no less than one full work shift in advance and will be required to take annual leave unless leave without pay is requested.
>
> "(3) Group dismissal authority will not be used to create a holiday.

Obviously, Respondent's reliance on the DOD and DA Regulations as the basis for its rejection of IAM's demand for administrative leave was in good faith; nevertheless, General Counsel asserts that because of the Authority's decision in *Long Beach Naval Shipyard, Long Beach, California*, 7 FLRA No. 53 (December 16, 1981), Respondent was wrong, IAM's proposal was negotiable, and, as Respondent failed and refused to bargain on IAM's proposal, it violated §§16(a)(1) and (5) of the Statute. I have given careful consideration to the Authority's decision in *Long Beach Naval Shipyard, supra*, but, while it is certainly dispositive of the negotiability of IAM's proposal under the Federal Personnel Manual, upon which Respondent also relied (Res. Exh. 5), I find nothing therein that addresses the more specific provisions of the DOD or DA Regulations

upon which Respondent principally relied. General Counsel's response to the DOD and DA Regulations was, simply, to ignore them. FPM Supplement 990-2, specifically provided:

> "(6) 'Supplemental regulation. Each department and agency is authorized to issue supplemental regulations not inconsistent with this subpart'" (S3-2 c. (6); Res. Exh. 5).

Neither the DOD nor DA Regulations are inconsistent with the provisions of the FPM, *cf., Defense Contract Administration Services Region, Boston, Massachusetts, et al.*, Case Nos. 1-CA-212, 1-CA-298, 1-CA-299, and 1-CA-300 (OALJ-81-024, December 22, 1980); *Harry Diamond Laboratories, et al.*, Case Nos. 3-CA-719, 3-CA-889, and 3-CA-970 (OALJ-81-104, May 18, 1981). Certainly, the DOD Regulations were "agency" regulations within the meaning of §17(a)(2) and (3) of the Statute and the DA Regulations were issued by a "primary national subdivision of said agency" within the meaning of §17(a)(3) of the Statute; IAM is not the exclusive representative of the majority of employees of either the DOD or DA; and, pursuant to §17(a)(2), "matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection" are subject to the duty to bargain "only if the Authority has determined under subsection (b) of this section that no compelling need . . . exists for the rule or regulation." The Authority has made no such determination that no compelling need exists for either the DOD or the DA Regulation, nor do I infer such a determination from the Authority's *Long Beach Naval Shipyard, supra*, negotiability decision. To the contrary, in the absence of any reference whatever by the Authority to DOD or Department of the Navy Regulations in its *Long Beach Naval Shipyard* decision, *supra*,

I must assume that the question of agency regulation, if applicable to the closure there involved, was not raised. In the absence of a determination by the Authority, pursuant to §17(b) of the Statute,[2] that no compelling need exists for the rule or regulation, Respondent was under no duty to bargain as to the grant of administrative leave for November 27, 1981, as the controlling DOD and DA Regulations specifically provided, *inter alia*, that administrative leave for such period "is not to be used" for anticipated closures planned in advance.

Respondent further asserts that IAM, in effect, "dropped" its demand for administrative leave when it presented its written proposal, which did not include it, nor did IAM thereafter renew its oral demand for administrative leave. IAM asserts it did not "drop" its demand for administrative leave. In view of my conclusion that Respondent was not, in any event, obligated to bargain on the matter of administrative leave, it is unnecessary to resolve this further assertion.

Although not alleged in the Complaint, General Counsel further asserts that Respondent bargained in bad faith on October 19, 1981, by rejecting "a Union proposal which would have allowed a liberal leave policy" which it granted on December 16, 1981, as to the December 24 and 31, 1981, closure. For reasons set forth hereinafter, I do not agree.

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[2] *Boston District Recruiting Command, Boston, Massachusetts*, Case No. 1-CA-206, *et al.*, OALJ-81-023 (December 22, 1980); *Defense Logistics Agency (Cameron Station, Virginia), et al.*, Case No. 1-CA-213, OALJ-81-131 (July 7, 1981); *Headquarters, Defense Logistics Agency, et al.*, Case No. 3-CA-664, *et al.*, OALJ-81-133 (July 10, 1981); *Harry Diamond Laboratories, et al.*, Case No. 3-CA-719, *et al.*, OALJ-81-104 (May 18, 1981).

IAM's written proposal of October 19 was that:

> ". . . employees *who desire* to work be permitted to do so and that those who work be provided all the rights as per the negotiated agreement" (G.C. Exh. 5).

The agreement of December 16, 1981, was:

> "1. Liberal Leave Policy
> "2. For those who work the terms of the agreement be upheld commensurate with the purpose of achieving energy savings" (G.C. Exh. 6).

General Counsel uses the phrase "Liberal Leave Policy" to mean something quite different than the words would indicate, namely, that Respondent would operate, *i.e.*, APG would not be closed. Of course, there was no question that Respondent had proposed to grant leave liberally. If it were assumed that "liberal leave policy" meant that APG would be open, then IAM's October 19 proposal that "employees *who desire* to work be permitted to do so" may have implied the same meaning; but more significant is that Paragraphs 6 and 7 of Respondent's November 4, 1981, notice provided, in part, as follows:

> "6. I realize that some employees will desire to come to work rather than choose the leave/compensatory options available to them as listed in paragraphs 4 and 5 above. Employees choosing to work will, in most cases, be required to work in minimally heated facilities. Installation-wide support is needed in curtailing operations during this period . . .
>
> "7. Guidance previously disseminated in DF, STEP-CP-M, 2 October 1981, subject: Thanksgiving Day Holiday Period, regarding the curtailment of operations during that period remains as stated therein. Individual latitude regarding work during the Christmas period is being granted since sufficient time may not remain for some employees to accrue leave to cover absences during this time frame" (Res. Exh. 7).

Consequently, Respondent's decision to curtail operations on December 24 and 31, 1981, was significantly different than its decision as to November 27, 1981, in that, because it recognized that some employees would be unable, in the time remaining in the leave year, to accrue leave to cover the December dates, Respondent proposed to grant "individual latitude regarding work during the Christmas period." Accordingly, there was no question that the bargaining which took place was foursquare within the bounds of impact and implementation of Respondent's curtailment decision.

I have grave reservations that IAM's written proposal of October 19 was within Respondent's obligation to bargain on impact and implementation. That is, where management exercises a reserved right in deciding to close a facility, bargaining on impact and implementation does not extend to negating that decision. Nevertheless, I do not reach this question. Rather, I conclude that IAM terminated negotiations on October 19 without bargaining fully. In this regard, I fully credit the testimony of Mr. Weppner that when he started to give his reasons for rejecting IAM's proposal because it was too broadly written, "we would have no idea how many people would show up, where they would go to work. I was concerned about safety . . . about the buildings, which ones to open, which ones weren't going to be used . . .", Mr. McDeshen said "There is no sense in talking anymore. We are leaving . . . I said I felt that was inappropriate. So the Union walked out. . . ." (Tr. 87). There is no dispute that

Respondent rejected IAM's written proposal; but from the testimony of Mr. Weppner, which is fully supported by the testimony of Ms. Marguerite Zealor, Labor Relations Specialist (Tr. 108), Mr. Kersey Alexander Jones, Jr., Material Testing Director (Tr. 113), and Mr. Thomas S. Swarts, Facilities Engineering Director (Tr. 117-119), members of Respondent's negotiating committee, the record does not show any refusal of Respondent to bargain on October 19. To the contrary the record shows that Respondent indicated it would still like to discuss impact (Tr. 119) and, although Respondent stated that it was unacceptable to have no control, the record does not show that Respondent in any way foreclosed consideration of IAM's proposal that employees be permitted to work. Indeed, the record shows that further negotiations were foreclosed only by IAM's precipitous termination of negotiations. If, as might appear from Mr. McDeshen's testimony (Tr. 26) and from the testimony of Mr. Mitchell (Tr. 48), that IAM was, in fact, seeking to change the decision to close the APG on November 27, which was a reserved right of management, then Respondent's refusal to bargain would not, in any event, have violated §§16(a)(1) or (5) as Respondent was obligated to bargain only as to impact and implementation, *i.e.*, as the Statute states, "procedures which management . . . will observe" or "appropriate arrangements for employees adversely affected by the exercise of any authority under this section. . . " (§6(b)(2) and (3)), not the decision itself, *Department of the Air Force, 47th Air Base Group*, 4 FLRA No. 65 (1980). Nor, of course, was either Mr. McDeshen or Mr. Mitchell correct that under the October 2 guidelines "there would be no one working", as

Paragraph 4 of the October 2 notice specifically provided, in part, as follows:

> "4. Even though their services are not required on 27 November 1981, the following employees must, at their discretion, be allowed to work or use leave without pay requested by SF 71:
>
> "a. Employees who have used all available leave (accrued and advanced). . . " (G. C. Exh. 3).

The record is further clear that on October 19 Mr. Weppner had stated that "we had at least 15 opportunities to work 15 persons" (Tr. 83, see, also, Tr. 42).

The record further shows, as Mr. Weppner testified, that IAM declined both on the afternoon of October 19 and on October 20, 1981, to negotiate further and, finally, on November 24, 1981, refused to negotiate concerning the November 27 closure because IAM "had filed a ULP. Therefore the issue was closed. . . ." (Tr. 41). Of course, IAM is not charged with a refusal to bargain at any time. The obligation to bargain is a continuing obligation and a charge that a refusal to bargain occurred on a prior occasion neither excuses a subsequent refusal to bargain nor is its pendency a defense to an appropriate subsequent demand to bargain, *cf. Kentucky National Guard*, 4 FLRA No. 73 (1980); but that is not the situation here. Nevertheless, Respondent, on November 24, 1981, invited further negotiations on the impact and implementation of the November 27, 1981, closure as part of the negotiations with respect to the December 24 and 31 closure, which IAM declined. Legally, a refusal to bargain on one occasion is not "cured" by an offer to bargain at a later date, *Vandenberg AFB, 4392d Aerospace Support Group, Vandenberg AFB, California*, A/SLMR No. 435, 4 A/SLMR 626 (1974) (*Compare* decision of the Administrative Law Judge, 4 A/SLMR at 633, and the decision of the Assistant Secretary, 4 A/SLMR at 627)

although the Council, on appeal, held that where, as in *Vandenberg*, a brief interruption of negotiations has a *de minimis* effect a finding of a violation is not warranted, FLRC No. 74A-77, 3 FLRC 491 (1975), 5 A/SLMR No. 554, 5 A/SLMR 574 (1975). Had Respondent refused to bargain in good faith on October 19, 1981, it would not have been "cured" by Respondent's offer to bargain on November 24, 1981. I have found, however, that Respondent did not refuse to bargain in good faith on October 19, 1981, notwithstanding that Respondent rejected IAM's proposal as written, for the reason that IAM terminated negotiations without bargaining fully on matters of impact and implementation within the scope of Respondent's obligation to bargain, and, accordingly, Respondent's offer to bargain on November 24, 1981, with respect to the November 27, 1981, closing of APG reaffirmed Respondent's offer to continue negotiations made both on October 19 and 20 and, to this extent, shows that Respondent did not refuse to bargain as to the impact and implementation of its decision to close APG on November 27, 1981. Indeed, because IAM declined to negotiate the November 27 closure on November 24, it cannot be known whether negotiations as to the December 24 and 31 curtailment, which resulted in an agreement, would have affected the November 27 closure.

Having found that Respondent did not violate §§16(a)(5) or (1) of the Statute, as alleged in the Complaint, by refusing to negotiate on the grant of administrative leave for November 27, 1981, as the grant of administrative leave was precluded by controlling DOD and DA Regulations, and that Respondent did not otherwise fail or refuse to bargain in good faith on the impact and implementation of its decision to close

APG on November 27, 1981, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 3-CA-20077 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 15, 1982
Washington, D.C.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1327

U. S. Army Engineer Center and
Fort Belvoir and
U. S. Department of the Army,

Petitioners,

versus

Federal Labor Relations Authority,

Respondent.

The American Federation of Government Employees, AFL-CIO, Local 1052,

Intervenor/R.

On Petition for Review of a Decision of the Federal Labor Relations Authority.

Argued: February 4, 1985—Decided: May 23, 1985

Before WIDENER and WILKINSON, Circuit Judges, and MacKENZIE, Chief United States District Judge for the Eastern District of Virginia, sitting by designation.

Deborah Ruth Kant, Appellate Staff, Civil Division, Dept. of Justice (Richard K. Willard, Acting Assistant Attorney General; William Kanter, Appellate Staff, Civil Division, Dept. of Justice on brief) for Petitioners; Robert J. Englehart (Ruth E. Peters, Solicitor; Steven H. Svartz, Deputy Solicitor on brief) for Respondent; Joseph Goldbert (Mark D. Roth on brief) for Intervenor.

WILKINSON, Circuit Judge:

This case concerns the procedures by which the Federal Labor Relations Authority may determine the negotiability of agency rules and regulations for purposes of collective bargaining. The issue is one of statutory construction under the Federal Labor-Management Relations Act ("FLMRA"), Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 *et seq.* (1982). The Act provides, *inter alia*, that agency rules or regulations may be subjects for collective bargaining if the Federal Labor Relations Authority ("FLRA" or "the Authority") has determined in a negotiability proceeding that there is no "compelling need" for the rule or regulation. 5 U.S.C. § 7117(a), (b). We must decide whether a negotiability proceeding is the only permissible procedure for the resolution of compelling need or whether the Authority may alternatively make a compelling need determination in the context of an unfair labor practice (ULP) proceeding under 5 U.S.C. § 7118.

The Authority has held, pursuant to 5 C.F.R. § 2423.5 (1985), that it may make the compelling need determination in a ULP proceeding where an agency has by regulation unilaterally acted to change existing conditions of employment. We disagree. The statute makes

clear that the § 7117(b) negotiability appeal is the only authorized procedure for the purpose. Therefore, we reverse and remand the case to the Federal Labor Relations Authority for determination of compelling need pursuant to 5 U.S.C. § 7117(b).

I

In April 1981 the Department of the Army issued a regulation, AR 690-400, Chapter 430, setting forth a new performance appraisal system. The Army directed its components, including petitioner Fort Belvoir, to institute the new system no later than October 1, 1981. The new regulation provided, *inter alia*, that employees with current annual ratings of "Highly Successful" would be credited with two years of additional service for reduction-in-force purposes. It also provided that rating supervisors would discuss proposed appraisals of performance with rating reviewers before discussing such appraisals with the employees themselves.

After issuance of the new regulation but prior to its institution, the American Federation of Government Employees, AFL-CIO, Local 1052 ("the union"), exclusive representative of a unit of employees at Fort Belvoir, met with management to negotiate over the impact and implementation of the new system. The union advanced two proposals in conflict with the regulation: 1) that employees with current annual ratings of "Highly Successful" not have any years added for reduction-in-force purposes; and 2) that an employee's supervisor prepare his proposed performance appraisal, give it to the employee for his signature, and discuss it with him before discussing it with the rating reviewer. After checking with the Army, Fort Belvoir responded that it could not negotiate over the procedures, and the new regulation took effect on June 1, 1981.

Thereafter, the union instituted an unfair labor practice proceeding under 5 U.S.C. § 7118. The General Counsel of the FLRA accordingly filed a complaint against both Fort Belvoir and the Army, alleging that the Fort had violated 5 U.S.C. § 7116(a) (1) and (5) by refusing to bargain over the union's proposals and alleging that the Army had violated 5 U.S.C. § 7116(a) (1) by preventing the Fort from bargaining, thereby interfering with the collective bargaining relationship between the union and Fort Belvoir.[1] The case came before the Federal Labor Relations Authority on briefs submitted by the Army and Fort Belvoir and by the FLRA's General Counsel.

The Army's defense rested upon 5 U.S.C. § 7117, which provides that the duty to bargain does not extend to matters which are the subject of agency-wide regulation unless the FLRA has determined that there is no compelling need for the regulation. To determine compelling need, the statute authorizes a negotiability proceeding, an expedited process that, unlike a ULP proceeding, does not involve the FLRA's General Counsel. As a negotiability appeal had not taken place, the Army argued, the union could not raise the matter in an unfair labor practice proceeding.

The Authority's General Counsel argued that the FLRA could make the necessary compelling need determination in the context of an unfair labor practice proceeding, as opposed to a negotiability appeal, in this

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[1] 5 U.S.C. § 7116(a) (1) and (5) provide as follows:

(a) For purposes of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise of any right under this chapter; . . .

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; . . .

instance. Regulations promulgated by the Authority pursuant to 5 U.S.C. § 7117 ("Expedited Review of Negotiability Issues")[2] and 5 U.S.C. § 7118 ("Unfair Labor Practice Proceedings")[3] permit the union to choose between the two procedures where "the matter proposed to be bargained" involves "actual or contemplated changes in conditions of employment." Since such changes were involved here, in unilateral action taken by the agency, the General Counsel argued that a negotiability proceeding was not the exclusive remedy provided by the statute.

Relying upon its earlier holding in *Defense Logistics Agency (Cameron Station, Virginia), et al.*, 12 FLRA No. 86 (1983), the Authority ruled that it could decide

[2]5 C.F.R. § 2424.5 provides as follows:

> Where a labor organization files an unfair labor practice charge pursuant to Part 2423 of this subchapter which involves a negotiability issue, and the labor organization also files pursuant to this part a petition for review of the same negotiability issue, the Authority and the General Counsel ordinarily will not process the unfair labor practice charge and the petition for review simultaneously. Under such circumstances, the labor organization must select under which procedure to proceed. . . . Cases which solely involve an agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained *and which do not involve actual or contemplated changes in conditions of employment* may only be filed under this part. [Emphasis supplied.]

[3]5 C.F.R. § 2423.5 contains similar language, concluding as follows:

> Cases which solely involve an agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained and *which do not involve actual or contemplated changes in conditions of employment* may only be filed under Part 2424 ["Expedited Review of Negotiability Issues"] of this subchapter. [Emphasis supplied.]

the compelling need issue in an unfair labor practice proceeding where an agency had issued or revised a regulation that caused a unilateral change in conditions of employment.[4] *U. S. Army Engineer Center, et al.*, 13 FLRA No. 116 (1984). Proceeding to the merits, the Authority found that the Army failed to carry its burden of demonstrating a compelling need for the new regulation;[5] hence both proposals were negotiable. Consequently, the Authority held the Army guilty of an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1), although it dismissed charges against Fort Belvoir because its actions had been directed by the Department of the Army. In addition to issuing a cease-and-desist order against the Army, the Authority directed it both to permit Fort Belvoir to bargain on the two proposals and to post appropriate notices. The Army and Fort Belvoir brought this appeal; the FLRA cross-petitioned for enforcement of its order.

II

The Federal Labor Management Relations Act states in unambiguous terms that, where an agency regulation is asserted as a bar to negotiations between a governmental employer and a union, the FLRA must determine that no compelling need for the regulation exists *before* any duty to bargain arises on the part of

[4]The Authority's interpretation of the statute was recently upheld in *Defense Logistics Agency v. FLRA*, 754 F.2d 1003 (D.C. Cir. 1985), although the case was remanded for further evidence on the question of compelling need.

[5]The Authority has issued a regulation setting forth the criteria for determining "compelling need." 5 C.F.R. § 2424.11 (1985).

the employer. The sole statutory procedure for making the compelling need determination is a negotiability appeal prescribed by 5 U.S.C. § 7117(b) and the relevant regulations of the FLRA. 5 C.F.R. § 2424. 5 U.S.C. § 7117 provides, in relevant part, as follows (emphasis supplied):

> (a) (2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection *only if* the Authority *has determined under subsection (b) of this section* that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.
>
> (3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency. . .[6]
>
> (b) (1) In *any case* of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a) (3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the

[6]There is an exception to this paragraph for a union which represents a majority of all employees of the issuing agency and which has therefore been accorded "national consultation rights." Any bargaining representative with national consultation rights must be informed of any substantive change in conditions of employment proposed by an agency, be given an opportunity to present its views thereon, and receive a written statement of the agency's reasons for its final action. 5 U.S.C. §§ 7117(a) (3), 7113(b). That exception does not apply here.

> Authority *shall determine under paragraph (2) of this subsection,* in accordance with regulations prescribed by the Authority, whether such a compelling need exists.
>
> (2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—
>
> (A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or
>
> (B) the Authority determines that a compelling need for a rule or regulation does not exist.
>
> (3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.
>
> (4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party to any hearing under this subsection.

While the statute requires expedition of any discretionary hearing, the regulations state the Authority shall expedite all proceedings under the section and shall issue a written decision ""at the earliest possible date." 5 C.F.R. § 2424.10.

"As in all cases involving statutory construction, 'our starting point must be the language used by Congress.'" *American Tobacco Co. v. Patterson,* 456 U.S. 63, 68 (1982), *quoting Reiter v. Sonotone Corp.,* 442 U.S. 330, 337 (1979). Our duty is to "give effect to the

intent of Congress," *United States v. American Trucking Ass'n*, 310 U.S. 534, 542 (1940), which we must first seek in the "plain language" of the statute, giving the words their "ordinary meaning." *American Tobacco Co.*, 456 U.S. at 68 (citation omitted.)

The words emphasized in the statute are those of condition precedent. They state plainly and in absolute terms that the employer has a duty to bargain over an agency-wide regulation[7] *"only if"* the FLRA *"has determined under subsection (b) of this section"* that no compelling need for the regulation exists. No exceptions exist for regulations that "involve actual or contemplated changes in conditions of employment," 5 C.F.R. § 2424.5. No provision states that the compelling need determination may occur under 5 U.S.C. § 7118, governing unfair labor practice proceedings, simply because the Authority or one of the parties finds that procedure more convenient.[8] The Authority argues that while the union could have pursued a § 7117(b) negotiability appeal, it was not required to; nor does

[7]The Department of the Army is, of course, a "primary national subdivision" of the Department of Defense. *See* 5 U.S.C. §7117(a) (3). For convenience, the short-hand term "agency-wide regulation" is used throughout this opinion.

[8]In *American Federation of Government Employees, Local 2736 v. FLRA*, 715 F.2d 627 (D.C. Cir. 1983), the issue was whether the legal question of negotiability should be combined with the factual issues in an unfair labor practice proceeding. There, as here, the Authority ruled that the entire dispute could be resolved in the ULP. Stating that "the statutory command, as supplemented by the legislative history, is unmistakable," *Id.* at 629, the court held the union entitled to an expedited review of the legal question in a separate negotiability appeal. The court there was dealing with a negotiability issue under 5 U.S.C. § 7117(c) (all negotiability issues other than those posing the question of

(Continued)

the statutory wording preclude the Authority from permitting the union a choice of procedures, as specified by 5 C.F.R. § 2424.5. This contention ignores the use of the word "only" in the statute. "Only" is a highly singular word. It does not suggest alternatives or choice. Moreover, 5 U.S.C. § 7117(a) (2) is clear that any duty to bargain on the employer's part arises only after the FLRA *"has determined"* that no compelling need for the disputed regulation exists. It is illogical, in light of this language, to maintain that a union could charge an agency with "having engaged in or engaging in an unfair labor practice," 5 U.S.C. § 7118(a), because the employer has refused to bargain over subject matter as to which no duty to bargain *has been determined* to exist.

We also reject appellee's interpretation of the phrase "then in effect" in 5 U.S.C. § 7117(b) (1). Appellees argue that this language limits the exclusive application of § 7117(b) to situations where a union challenges the need for *pre-existing* regulations during collective bargaining but does not include circumstances where a union challenges an agency's unilateral *change* in a regulation affecting conditions of employment. The Court of Appeals for the District of Columbia Circuit found this reading of the statute "reasonable" and therefore unheld the FLRA's decision in *Defense Logistics Agency v. FLRA*, 754 F.2d 1003 (D.C. Cir. 1985). With respect, we differ. We believe the phrase "then in effect," as used in the statute, clearly refers to regulations in effect at the time of the collective bargaining process, whether they be new, old, or modified.

(Continued)
compelling need). The Authority, however, has prescribed the same procedures for both, § 7117(b) and (c), *see 5 C.F.R.* § 2424.1, except for 5 C.F.R. § 2424.11, which sets forth the criteria for determining compelling need under subsection (b). 5 C.F.R. § 2424.1 begins, "The Authority will consider a negotiability issue under the conditions prescribed by 5 U.S.C. § 7117(b) and (c)."

Any other interpretation would hamstring an agency's ability to institute new regulations even when it perceives a compelling need for the change, or allow the expedited negotiability appeal procedure to be bypassed whenever a new regulation is instituted or an old one is modified. The result of this reasoning is that 5 U.S.C. § 7117(b) could soon be regulated out of existence. To follow that path is to abandon our mandate to give equal effect to all provisions of the statute. *S. Dantoni, Inc. v. Great Atlantic & Pacific Tea Co.*, 496 F.2d 1378, 1383 (5th Cir. 1974); Sutherland, Statutory Construction § 46.06 (4th ed. 1984). *See Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, 261 (1975); *United States v. Snider*, 502 F.2d 645, 652 (4th Cir. 1974). Section 7117(b) enables a government agency to act in furtherance of its essential mission without facing the charge and possible sanctions of an unfair labor practice. It is implausible to suppose that Congress intended a sweeping exception to the operation of this section through the brief and buried phrase, "then in effect."

In reaching our conclusion, we recognize the special deference owed an agency's interpretation of its own enabling statute. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 104 S.Ct. 439 (1983). We recognize our duty to uphold that interpretation if it is "reasonable and defensible," *American Federation of Government Employees, Local 2096 v. FLRA*, 738 F.2d 633, 637 (4th Cir. 1984), *citing Bureau of Alcohol, Tobacco and Firearms*, even if it is not the construction we would reach in a *de novo* setting. *Chevron v. Natural Resources Defense Council*, _____ U.S. _____, *104 S.Ct. 2778, 2781-2783 (1984); Defense Logistics Agency v. FLRA*, 754 F.2d 1003, 1013-1014. Under 5 U.S.C. § 7123(c), our review is limited to whether the agency's construction is "arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (A) (1982). Nonetheless, the Supreme Court has cautioned that courts must not "rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, _____, 104 S.Ct. 439, 444, *quoting NLRB v. Brown*, 380 U.S. 278, 291-292 (1965). To interpret this statute as the FLRA would have us do would be to undercut a mechanism wrought by Congress for determining the negotiability of rules and regulations throughout the federal government.

III

An examination of the legislative history of the FLMRA supports the view that compelling need must be determined in a § 7117(b) negotiability appeal. First, it is noteworthy that Congress paid careful attention to § 7117. The first reported bill in the House made only government-wide regulations a potential bar to negotiations, and even these could be subjected to the test of compelling need. Matters covered by agency-wide regulations were always negotiable. H.R. Rep. No. 1403, 95th Cong., 2d Sess. (1978), *reprinted in* Subcommittee on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 697 (Comm. Print 1979) ("Legislative History"). In response to the Senate's differing version, the House accepted a substitute bill proffered by Congressman Udall which changed the provision to its present form. Legislative History at 927. That substitute brought negotiability disputes under the separate expedited process of

§ 7117(c); the earlier House bill had provided for their resolution in an unfair labor practice proceeding. *Id.* at 927. This indicates that Congress was quite conscious of the differences in the two proceedings.[9]

Thus, Congress made in § 7117 a considered decision favoring the negotiability appeals procedure over the ULP process when the question of negotiability was in doubt. This decision in turn reflected Congress' determination to obtain "more effective and efficient Federal Government that is a predictable result of a meaningful labor-management program for Federal agencies," Legislative History at 931, by balancing the duty to bargain in good faith with the need to maintain essential governmental rights and flexibility — a balance achieved primarily through the provisions regarding reserved management rights and scope of duty to negotiate, §§ 7106 and 7117. *See, e.g.,* Legislative History at 843-845; 927-934. Given the obvious importance that Congress attached to these provisions, we cannot turn our backs on the procedure set out in 5 U.S.C. § 7117 and create for the parties the procedural choice that Congress foreclosed.

Appellees' contention that current procedures should be guided by past practice under Executive Order No. 11491 (Oct. 29, 1969), *reprinted in* Legislative History at 1244-1257, which the FMLRA supplanted, is unpersuasive. Appellees are correct that under that Order, as it existed at the time the FMLRA was passed, the procedure they recommend today was followed. However, appellees overlook the fact that the procedure was specifically authorized by two 1975 amendments to the Order, which were themselves revoked in 1978.

[9] In earlier versions, compelling need determinations were already to be made in negotiability appeals, as now provided by § 7117(b). Legislative History at 927.

Until 1975, no proposal was negotiable if it was "contrary to law, regulation, controlling agreement, or this Order," Executive Order No. 11491, Section 11(c), *reprinted in Legislative History* at 1251. If a labor organization wished to raise a negotiability issue under this criterion, it could do so by appeal to the Federal Labor Relations Council (the predecessor of the FLRA). *Id.*, Section 11(c)(4). In 1975, a comprehensive review of labor-management relations in the federal sector resulted in a number of recommendations and consequent changes. *See* Labor-Management Relations in the Federal Service January 1975: Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11,491, as Amended, *reprinted in* Legislative History at 1283-1335. Among the changes was the introduction of the compelling need standard for judging the negotiability of agency regulations affecting conditions of employment. *Id.* at 1305-1306. In addition, the Council's Report recommended that where an agency unilaterally changed established personnel policy or practice, or any matter affecting working conditions, a labor organization should be permitted to challenge the action either by appeal to the Council, as already established, or by appeal to the Assistant Secretary of Labor in the context of an unfair labor practice proceeding. *Id.* at 1324-1325. This recommendation was effectuated by Executive Order No. 11838 (Feb 6, 1975), *reprinted in* Legislative History at 1336-1341.[10]

[10] *See* specifically paragraph 4 (amending section 6(a) of Executive Order 11491), Legislative History at 1336, and paragraph 13 (amending section 11 of Executive Order 11491 and adding section 11(d) to permit negotiability determinations in the course of ULP proceedings), *id.* at 1338-1339.

The 1975 amendments thus achieved the exact result urged by appellees today. What appellees ignore, however, is the fact that Congress had this model before it at the time the FMLRA was drafted, debated, and passed, yet did not choose to incorporate those provisions into the new statute. Instead, Congress, while retaining the compelling need standard, crafted the expedited negotiability appeal to resolve such questions.

Our interpretation of Congress' actions as a rejection of the old Executive Order provisions is buttressed by the fact that after passage of the Act, the President specifically amended Executive Order No. 11491 to delete the cited 1975 changes. Executive Order 12107 (Dec. 28, 1978), 3 C.F.R. 264 (1979).[11] This Order took effect twelve days before the new FMLRA, and was signed by President Carter to implement Reorganization Plan No. 2 of 1978, 3 C.F.R. 323 (1979), whereby the FLRA was established and the way was paved for transition to the new statute. 3 C.F.R. at 264 (1979). Congress had specified in 5 U.S.C. § 7135 that procedures under Executive Order 11491, as amended, would remain in force "until revised or revoked by the President, or unless superseded by specific provisions of this chapter . . ." Thus the Executive branch, in light of the new legislation, abolished the old procedure, now suggested by appellees as controlling, to make way for the process established by 5 U.S.C. § 7117.

[11] Executive Order No. 12107 totally rewrote section 6(a) of the old Order to provide for the duties of the General Counsel; there is no provision similar to the old 6(a). 3 C.F.R. at 272 (1979). Section 11(d) of the old Order was revoked. *Id.* at 273.

IV.

A court's task in interpreting particular sections of statutes is to give them "'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose," *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 631-632 (1973), *quoting Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 488 (1947). The overall statutory scheme of the Federal Labor Relations Act strikes a balance between two important values: the rights of public employees to bargain collectively over conditions affecting their employment; and the unique role of the public employer as the instrument of democratic will, with the need to promote the public interest through actions (including regulations) reflecting the agency's mission and purpose. 29 U.S.C. § 7101; Legislative History at 932-933. We think the compelling need determination in § 7117(b) is, along with the reservation of management rights in § 7106,[12] one of those instances in the Act where agency action in the public interest received explicit Congressional protection.

The care which Congress gave this legislation is attested to by over 1,500 pages of legislative history. It is significant that Congress chose to provide *separate* avenues of negotiability appeals and unfair labor practice proceedings to resolve different kinds of questions. There are numerous distinctions between the two processes. A negotiability appeal is presented directly to

[12] 5 U.S.C. § 7106 lists specific areas of agency authority, including the agency's right to determine its own "mission, budget, organization, number of employees, and internal security practices," as well as hiring, layoff, disciplinary, and work assignment powers. Such rights are not negotiable, although the procedures by which those rights are implemented may be negotiated, and the union may bargain over arrangements for employees who are adversely affected by the exercise of management rights.

the Authority, whereas an unfair labor practice hearing is heard first by an administrative law judge. *Compare* 5 C.F.R. § 2424 *with* § 2423.14. Negotiability appeals are expedited procedures, whereas ULP proceedings are not. Hearings on negotiability appeals are discretionary with the Authority, 5 U.S.C. § 7117(b) (3), and usually are not held, *see Defense Logistics Agency v. FLRA*, 754 F.2d at 1011, n. 13, whereas they are part of the formal process in an unfair labor practice proceeding, 5 U.S.C. § 7118(a) (6). The General Counsel is not a party to any hearing held pursuant to a negotiability appeal, 5 U.S.C. § 7117(b) (3). In a ULP proceeding, the General Counsel investigates the charge, issues and serves the complaint, and may provide for informal methods of resolution prior to the complaint, 5 U.S.C. § 7118(a) (1), (5). The agency issuing the regulation is a necessary party to a negotiability hearing, 5 U.S.C. 7117(b) (4), but not to an unfair labor practice proceeding. In addition, a finding of no compelling need in a negotiability appeal has only the prospective effect of requiring the agency — or the local employer — to negotiate over the subject matter with the particular bargaining representative. A finding of an unfair labor practice could result in retroactive sanctions. 5 U.S.C. § 7118(a) (7) (C).

Some reason must be assigned Congress' decision to delineate these two very different proceedings, for all parts of a statute are to be given effect, *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, 261 (1975); *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. at 633, and we may not assume Congress to have done a "useless, ineffective, or absurd thing," *Consumers Union of United States, Inc. v. Sawmill*, 512 F.2d 1112, 1118 (Temporary Emergency Ct. of Appeals), *aff'd en banc*, 525 F.2d 1068 (1975); *see also United States v. Turkette*, 452 U.S. 576 (1981).

That reason, as the Army argues in its brief, is to give a governmental agency the "flexibility to issue and revise regulations which the agency deems are essential to accomplish its executive function," Brief for Petitioners/Cross-Respondents at p. 19, while protecting the agency from the risk of thereby incurring the sanctions of an unfair labor practice proceeding. *Id.* at 20, 21. At the same time, the union is protected by the expedited procedure of § 7117(b) from any agency attempt to use its regulatory power as a means of removing an issue from the bargaining table and by the fact that only regulations which meet the strict standard of compelling need are considered non-negotiable. *See* 5 C.F.R. § 2424.11.

Thus, an examination of the history, policies, and, above all, the language of the Federal Labor Relations Act persuades us that Congress meant the § 7117(b) negotiability appeal to be the sole means of determining a compelling need question under the statute. To hold otherwise would upset Congress' attempt to preserve in careful balance the interests of federal employees in negotiating their working conditions, of agencies in the exercise of their regulatory powers, and of the country in the orderly and efficient administration of government.

Consequently, we reverse the judgment of the Federal Labor Relations Authority and remand the case to the Authority for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1327

U.S. Army Engineer Center, et al, Petitioners,

versus

Federal Labor Relations Authority, Respondent.

The American Federation of Government Employees, AFL-CIO, Local 1052, Intervenor/R.

July 26, 1985

ORDER

Upon consideration of respondent's petition for rehearing with suggestion for rehearing en banc,

IT IS ORDERED that:

1. The petition for rehearing is denied. As no judge has requested a poll on the suggestion for rehearing en banc, the suggestion for rehearing en banc is denied;
2. The case is remanded to the Federal Labor Relations Authority with directions to dismiss the unfair labor practice proceeding without prejudice to the right of the union to initiate a timely negotiability appeal under 5 U.S.C. § 7117(b) should petitioners reassert non-negotiability following issuance of the mandate.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Widener and Judge MacKenzie, Chief United States District Judge, sitting by designation.

For the Court,

JOHN M. GREACEN

CLERK

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1715

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL LABOR RELATIONS AUTHORITY,
PETITIONER

v.

ABERDEEN PROVING GROUND,
DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The Federal Labor-Management Relations Act, 5 U.S.C. (& Supp. III) 7101 *et seq.* provides that a federal agency's duty to bargain with its employees shall extend to a matter that is the subject of an agency regulation only if the Federal Labor Relations Authority (the Authority) has determined, in a negotiability appeal under 5 U.S.C. 7117(b), that there is no "compelling need" for the regulation at issue. The question presented in this case is whether a negotiability appeal under 5 U.S.C. 7117(b) is the only means by which the compelling need for an agency regulation may be challenged, or whether the Authority also has the power to resolve the compelling need issue in an unfair labor practice proceeding under 5 U.S.C. 7118.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The order of the court of appeals (Pet. App. 16a) summarily reversing the Authority's decision is unreported, as is the court of appeals' order (Pet. App. 17a) denying the Authority's motion for an initial hearing en banc. The court's earlier decision in *United States Army Engineer Center, Fort Belvoir* v. *FLRA* (Pet. App. 52a-69a), upon which the court based its summary reversal in this case, is reported

at 762 F.2d 409. The Authority's decision and order (Pet. App. 18a-51a) is reported at 21 F.L.R.A. No. 100.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1987. The petition for a writ of certiorari was filed on April 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Labor-Management Relations Act, 5 U.S.C. (& Supp. III) 7101 *et seq.* (the Act), "establishes a statutory basis for labor-management relations in the Federal service" (H.R. Rep. 95-1403, 95th Cong., 2d Sess. 38 (1978)). The Act requires federal agencies to bargain in good faith with the exclusive representatives of units of employees about the terms and conditions of employment. See 5 U.S.C. 7102, 7114. An agency's refusal or failure to bargain in good faith may constitute an unfair labor practice (5 U.S.C. 7116(a)(5)); whether it does so is determined in an unfair labor practice (ULP) proceeding under 5 U.S.C. 7118. The Act provides, however, that an agency's duty to bargain extends to matters covered by an agency-wide rule or regulation (or by a rule or regulation issued by a "primary national subdivision" of an agency, 5 U.S.C. 7117(b)(4)) "only if the Authority has determined under [5 U.S.C. 7117(b)] that no compelling need * * * exists for the rule or regulation" (5 U.S.C. 7117(a)(2)).

Section 7117(b) establishes the procedures by which the Authority is to determine the "compelling need" for an agency regulation. It provides that

"[i]n any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation * * * which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine * * * whether such a compelling need exists" (5 U.S.C. 7117(b)(1)). In making this determination, the Authority may conduct a hearing. 5 U.S.C. 7117(b)(3). Unlike a ULP proceeding (compare 5 U.S.C. 7118), a Section 7117 hearing "shall be expedited to the extent practicable and shall not include the [Authority's] General Counsel as a party" (5 U.S.C. 7117(b)(3)), but shall include the agency or primary national subdivision as a necessary party (5 U.S.C. 7117(b)(4)). And whereas a ULP proceeding may result in the retroactive imposition of sanctions against the agency, a finding of no compelling need under Section 7117 has only the prospective effect of requiring the agency, or the local employer, to negotiate over the subject matter purportedly covered by the agency regulation.

2. The present case arose on September 14, 1981, when, in an effort to conserve energy, respondent decided to close operations at the Aberdeen Proving Ground (APG) for three days, beginning the day after Thanksgiving, November 27, 1981. On September 15, David R. Weppner, respondent's labor relations specialist, met with representatives of the various unions representing APG employees and notified them that, as a result of the decision to curtail operations, all APG employees would be obliged to take annual leave on November 27. Pet. App. 34a-35a.

On October 6, respondent met with union representatives to discuss how the closure plans would be

implemented. Colonel Robert P. Jones, who chaired the meeting, reiterated that employees would have to take annual leave on November 27, and that if an employee had not accrued annual leave time he could be advanced leave time, take compensatory time, take leave without pay, or would be permitted to work. Pet. App. 36a. Following the meeting, respondent invited the unions "to negotiate concerning the impact and implementation of th[e] decision" (*id.* at 37a (citation omitted)).

Negotiations took place on October 19, 1981. Union representatives proposed that instead of having to take annual leave employees be granted administrative leave (Pet. App. 38a). Weppner, representing respondent, rejected this proposal, explaining that "'the rules and regulations * * * do not permit him to do this and that it verges on nonnegotiability in his opinion'" (*ibid.* (citation omitted)). Respondent relied in particular on Army and Department of Defense regulations that generally prohibit granting administrative leave when at least 24 hours' notice of an anticipated closure can be given.[1]

---

[1] DA Regulation CPR 990-2 provides, in relevant part (Pet. App. 42a-43a (quotation marks omitted)):

> S3-2. *Relieving Daily, Hourly, or Piecework Employees From Duty*
>
> * * * * *
>
> c. *Where advance notice can be given.* The authority to excuse employees administratively is not to be used in instances where the period of interrupted or suspended operations can be anticipated sufficiently in advance to permit arranging for assignment to other work or the scheduling of annual leave. Normally, where 24 hours' advance notice can be given, employees who cannot be assigned to other work must be placed on annual leave with or without their consent.

DOD Regulation 1400.25-M provides, in relevant part (Pet. App. 43a (quotation marks omitted)):

> S3-1 * * *
>
> d. *Limitation on Authority to Dismiss Employees Without Charge to Leave*
>
> * * * * *
>
> (2) When, because of planned management reasons, the closing of all or part of an activity is required for short periods of time, employees will be notified no less than one full work shift in advance and will be required to take annual leave unless leave without pay is requested.
>
> (3) Group dismissal authority will not be used to create a holiday.

3. The International Association of Machinists and Aerospace workers (the union) thereafter filed a ULP charge, alleging among other things that respondent had violated 5 U.S.C. 7116(a)(1) and (5) by refusing to bargain over the union's proposal that administrative leave be granted when APG was closed on November 27. On June 15, 1982, the administrative law judge ruled in respondent's favor and recommended that the Authority dismiss the union's complaint (Pet. App. 33a-51a). The ALJ found that "[r]espondent's reliance on the DOD and DA Regulations as the basis for its rejection of [the union's] demand for administrative leave was in good faith" (*id.* at 43a). Noting that the DOD regulations were "'agency' regulations within the meaning of [5 U.S.C. 7117(a)(2) and (3)]" and that "the DA Regulations were issued by a 'primary national subdivision of said agency' within the meaning of [5 U.S.C. 7117(a)(3)]," the ALJ explained that under

Section 7117(a)(2) the agency therefore had a duty to bargain over the administrative leave proposal "'only if the Authority has determined under [Section 7117(b)] that no compelling need * * * exists for the rule or regulation'" (Pet. App. 44a). Because "[t]he Authority ha[d] made no such determination [with respect to] * * * either the DOD or the DA Regulation" (*ibid.*), the ALJ concluded that "[r]espondent was under no duty to bargain as to the grant of administrative leave for November 27, 1981" (*id.* at 45a).

4. The Authority reversed (Pet. App. 18a-32a). It first rejected respondent's contention (*id.* at 21a) that "it had no duty to establish a compelling need for its regulations without the issue having been raised by the Union under the Authority's negotiability procedures." The Authority acknowledged (*id.* at 22a-23a) that "when an agency refuses to bargain over a union proposal during ongoing collective bargaining negotiations because the proposal is alleged to be inconsistent with existing agency-wide regulation for which a compelling need exists, section 7117 of the Statute requires that the issue be resolved through the procedures in section 7117 of the Statute and Part 2424 of the Authority's Rules and Regulations." But relying on its prior decision in *Defense Logistics Agency* (*Cameron Station, Virginia*), 12 F.L.R.A. 412 (1983), aff'd *sub nom. Defense Logistics Agency* v. *FLRA*, 754 F.2d 1003 (D.C. Cir. 1985), the Authority held (Pet. App. 23a) that "[a] different situation is presented" when an agency is alleged to have made "unilateral changes in conditions of employment" and "issues of negotiability—including, as in the instant case, assertions of compelling need for agency regulations—are raised as

affirmative defenses" (*ibid.*). In such cases, the Authority stated (*ibid.*), the compelling need for an agency-wide regulation may be resolved in two different ways. "[T]he Authority has promulgated procedures * * * which recognize a union's right either: (1) to seek resolution of the entire dispute, including the negotiability issues, in the unfair labor practice forum; or (2) to seek initial and separate resolution of the negotiability issues in the negotiability appeal forum" (*ibid.*).

In reaching this conclusion, the Authority reasoned that in the private sector issues of negotiability may be resolved in unfair labor practice proceedings and it discerned nothing in the Act or in its legislative history to "suggest[] that Congress intended to make an exception in the federal sector to this principle" (Pet. App. 23a-24a). The Authority said that the negotiability appeals procedures contained in Section 7117(b) do not "preclude the Authority from resolving any necessary negotiability issues, including those related to the compelling need for an agency regulation, in a unilateral change unfair labor practice case" (Pet. App. 24a). And it found confirmation for that view in the "pre-Statute labor-management relations program, Executive Order 11491, [which] authorized precisely what the Authority's procedures * * * were promulgated to permit: unified processing of any compelling need negotiability issue in the unfair labor practice proceeding in which it arises" (*id.* at 25a (footnote omitted)). The Authority asserted that its approach to the determination of compelling need issues "effectuates Congress' goal to facilitate and promote the collective bargaining process by providing for the resolution of all relevant issues in one proceeding, thereby obviating

the delay inherent in two separate and consecutive proceedings" (*ibid.*).

Having decided that the compelling need for the regulations in this case could be resolved in the ULP proceeding, the Authority next found that respondent had "failed to sustain its burden of establishing a compelling need for the DOD and DA regulations in accordance with * * * the Authority's Rules and Regulations" (Pet. App. 27a). It held that respondent had not shown that the regulations in question promoted the "goal of conserving energy" in that "[t]he record is barren of evidence which would demonstrate how the granting of administrative leave to unit employees, rather than annual leave, as the Union's proposal at issue here would require, in any way affects the Respondent's stated objective of conserving energy" (*ibid.*). The Authority accordingly held that respondent had violated Section 7116(a)(1) and (5) when it refused to negotiate concerning the administrative leave proposal (Pet. App. 28a). It ordered respondent to cease and desist from its refusal to negotiate, and it granted certain additional affirmative relief (*id.* at 28a-30a).

5. Relying on its earlier decision in *United States Army Engineer Center, Fort Belvoir* v. *FLRA*, 762 F.2d 409 (1985) (Pet. App. 52a-69a), the court of appeals, in an unpublished order, summarily reversed (*id.* at 16a). In *Fort Belvoir*, a union instituted a ULP proceeding under Section 7118 when Fort Belvoir, a component of the Department of the Army, refused to negotiate concerning an Army regulation that established a new performance appraisal system. As in the present case, the Authority decided in the context of the ULP proceeding that there was no compelling need for the Army regulation. The court

of appeals reversed, holding (Pet. App. 57a-58a (emphasis in the original)) that "[t]he Federal Labor Management Relations Act states in unambiguous terms that, where an agency regulation is asserted as a bar to negotiations between a governmental employer and a union, the FLRA must determine that no compelling need for the regulation exists *before* any duty to bargain arises on the part of the employer." The court observed further that "[i]t is illogical, in light of this language, to maintain that a union could charge an agency with 'having engaged in or engaging in an unfair labor practice,' 5 U.S.C. § 7118(a), because the employer has refused to bargain over subject matter as to which no duty to bargain *has been determined* to exist" (*id.* at 61a (emphasis in the original)). The court examined the legislative history of the Act and concluded that Congress had deliberately chosen "to provide *separate* avenues of negotiability appeals and unfair labor practice proceedings to resolve different kinds of questions" (*id.* at 67a (emphasis in the original)). Noting in particular the procedural differences between a negotiability appeal under Section 7117(b) and a ULP proceeding, the court held that Congress intended under Section 7117 "to give a governmental agency the 'flexibility to issue and revise regulations which the agency deems are essential to accomplish its executive function,' * * * while protecting the agency from the risk of thereby incurring the sanctions of an unfair labor practice proceeding" (Pet. App. 69a). The court accordingly concluded (*ibid.*) that "Congress meant the § 7117(b) negotiability appeal to be the sole means of determining a compelling need question under the statute."

ARGUMENT

The court of appeals' decision is correct. There is, however, a conflict between the Fourth Circuit and the D.C. Circuit concerning whether the compelling need for agency-wide regulations must be determined in a negotiability appeal under Section 7117, or may also be determined in a ULP proceeding. While it is not clear that the D.C. Circuit would decide the present case differently than the Fourth Circuit did, we believe that this case is an appropriate vehicle to resolve the conflict. We therefore agree with petitioner that further review by this Court is warranted.

1. The court of appeals predicated its summary reversal in this case on its prior decision in *Fort Belvoir*. There, the Fourth Circuit held that compelling need may be challenged only in a negotiability appeal under Section 7117. The plain language of the statute requires that conclusion. Section 7117(a)(2) states that the duty to bargain in good faith extends to matters covered by agency regulations "only if the Authority has determined under [Section 7117(b)] that no compelling need * * * exists for the rule or regulation." Until the Authority has made a determination of compelling need, an agency is under no duty to bargain over a matter covered by a regulation and thus cannot have committed an unfair labor practice. As the court of appeals put it, "[i]t is illogical, in light of this language, to maintain that a union could charge an agency with 'having engaged in or engaging in an unfair labor practice,' 5 U.S.C. § 7118(a), because the employer has refused to bargain over subject matter as to which no duty to bargain *has been determined* to exist" (Pet. App. 61a (emphasis in the original)).

The language of the statute is well-suited to its evident purpose of "prescrib[ing] the rights and obligations of employees" while at the same time "establish[ing] procedures to meet the special needs of the Federal Government in the labor-management relationship" (H.R. Rep. 95-1403, *supra*, at 38). In order to ensure "Federal agencies the right to manage government operations efficiently and effectively" (S. Rep. 95-969, 95th Cong., 2d Sess. 12 (1978)), Congress enacted in Section 7117 a separate "procedure for determining whether matters affecting conditions of employment which are the subject of any * * * [agency-wide] rule or regulation shall be negotiable" (H.R. Rep. 95-1403, *supra*, at 51). Hearings under that section must be "expedited"; they do not include the Authority's General Counsel as a party; and they provide for participation by the agency or primary national subdivision that issued the regulation as a necessary party (5 U.S.C. 7117(b)(3) and (4)). These procedures were carefully designed to give the agency an appropriate opportunity to establish that "there is a demonstrated, and justified, and overriding need" for the regulation at issue (H.R. Rep. 95-1403, *supra*, at 51). Having enacted the negotiability appeal procedures with such meticulous care, Congress cannot be supposed at the same time to have, sub silentio, empowered the Authority to circumvent Section 7117 entirely by deciding compelling need questions in the context of a ULP proceeding—to which the General Counsel is a party, and to which the agency that promulgated the regulation ordinarily is not.

2. In rejecting the Authority's position in *Fort Belvoir*, the Fourth Circuit took issue (Pet. App. 61a) with the decision of the D.C. Circuit in *Defense*

Logistics Agency v. *FLRA*, 754 F.2d 1003 (1985). In that case the agency issued a revised regulation redefining the class of employees required to file "Confidential Statements of Affiliations and Financial Interests" (754 F.2d at 1004 (citation omitted)). After one of the subordinate offices of the agency announced the changes to its employees, a union representing an appropriate bargaining unit proposed certain changes in the new regulation. The agency claimed that the regulation was nonnegotiable and the union thereupon filed a ULP charge with the Authority. Disagreeing with the ALJ in the case, the Authority concluded that it was free to resolve the compelling need for the new regulation in the context of the ULP proceeding. It acknowledged (*id.* at 1006 (citations omitted; emphasis added)) that "the § 7117(b) negotiability appeal is the sole avenue for resolving the question of compelling need in the case 'where an exclusive representative submits proposals on a matter subject to collective bargaining and the agency or activity asserts that such proposals are nonnegotiable because they conflict with an *existing* agency regulation for which a compelling need exists.'" The Authority contended, however, that "[t]he promulgation of a *new* agency-wide rule that effects * * * 'actual or contemplated changes in conditions of employment'" (*ibid.* (emphasis added)) may be considered in a ULP proceeding.

The D.C. Circuit held that while the Authority's construction of the statute was "not required" (754 F.2d at 1011 (footnote omitted)), there was a "permissible" and "reasonable" basis (*id.* at 1014) for the Authority's "distinction between, on the one hand, an agency's refusal to bargain over a proposal put forth during ongoing negotiations that concerns a

matter covered by an existing agency-wide rule, and, on the other hand, a refusal to bargain over a new agency-wide rule that effects a change in working conditions" (*id.* at 1008). The court found the language and history of the statute indeterminate (see *id.* at 1007-1011), and relied instead on policy reasons that it found to justify determining the compelling need for new regulations (as opposed to existing regulations) in a ULP proceeding (*id.* at 1012-1013):

> From the perspective of the employees, the ULP proceeding is far more desirable than the § 7117(b) proceeding in the context of an agency's refusal to bargain over a proposed or newly promulgated rule affecting working conditions. When an agency, during the course of negotiations over a contract, refuses to bargain over a proposal that the agency believes to be in conflict with an agency-wide rule, the employees suffer no harm or lost expectations; they simply fail in an effort to change existing working conditions. * * * By contrast, when the agency refuses to bargain over a new rule, promulgated in the middle of a contract term, the employees are made to suffer whatever detriment * * * the rule effects.

In light of these policies, the court found that it could not "say the Authority acted in contravention of the statutory purpose" (*id.* at 1013) when it concluded that it was free under the Act to resolve the compelling need for newly-issued regulations in a ULP proceeding.

3. As the Fourth Circuit recognized (Pet. App. 61a), its holding in *Fort Belvoir* was in conflict with the D.C. Circuit's decision in *Defense Logistics Agency*. Both of those cases involved newly issued

regulations. The Fourth Circuit rejected (Pet. App. 61a) any distinction between cases involving pre-existing regulations and cases involving new or changed regulations, and held that in all cases compelling need may be decided only in a negotiability appeal under Section 7117. By contrast, the D.C. Circuit had held in *Defense Logistics Agency* that the compelling need for newly-issued regulations may be resolved in a ULP proceeding.

Contrary to petitioner's assertion (Pet. 12, 25), that conflict is not squarely presented by the present case. Here, unlike in *Defense Logistics Agency*, the agency did not issue a *new* regulation; rather, it asserted that an *existing* regulation (as applied in the particular situation of a post-Thanksgiving shutdown) precluded negotiation concerning the union's administrative leave proposal. The D.C. Circuit's opinion in *Defense Logistics Agency* expressly declined to consider whether the compelling need for existing regulations may be determined outside Section 7117.

But while it is thus unclear whether the D.C. Circuit would have reached the same result as the Fourth Circuit did in the present case, we believe that the conflict between the circuits should be resolved and that this case is an appropriate vehicle to do so. For the reasons adduced by the Fourth Circuit, the D.C. Circuit's distinction between new and existing regulations is untenable. Nothing in Section 7117 carves out an exception for newly-issued regulations and the D.C. Circuit found no textual basis for the distinction that it drew. Moreover, the policy reasons for the statute do not justify any such distinction: an agency's need for flexibility in promulgating regulations—and its strong interest in being

a necessary party to any proceeding in which the compelling need for its regulations is at issue—are not diminished when new, rather than existing, regulations are involved.

In addition, while the D.C. Circuit's decision is by its terms limited to newly-issued regulations, the Authority has made it clear that it reads the case quite broadly. As both its decision and its petition to this Court in this case confirm, the Authority is apparently intent on resolving compelling need challenges in ULP proceedings whenever a regulation—newly-issued or otherwise—effects an "alleged unilateral change[] in conditions of employment" (Pet. 4). Because the phrase "conditions of employment" is deliberately broad under the statute (see 5 U.S.C. 7103 (a)(14)), and because (as illustrated by this case) the application of an existing regulation to new circumstances in a manner that can be said to change conditions of employment is a frequent occurrence, the Authority, if unchecked, will continue to decide a wide range of compelling need issues outside the format established by Section 7117.[2] We believe that such a practice is at odds with the compromise reached by Congress between the rights of federal employees on the one hand, and, on the other hand, the flexibility that federal agencies require in order to discharge their public functions.

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[2] In fact, we are advised by the Department of the Army that the Authority has sought or is presently seeking to decide in ULP proceedings the compelling need for agency-wide regulations governing matters as diverse as Army civilian drug testing, pay and fringe benefits, merit promotions, reductions in force, and travel and per diem allowances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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PETITIONER'S

BRIEF

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OCTOBER TERM, 1987

FEDERAL LABOR RELATIONS AUTHORITY,
PETITIONER

v.

ABERDEEN PROVING GROUND,
DEPARTMENT OF THE ARMY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, the Federal Labor Relations Authority is empowered to resolve, in an unfair labor practice proceeding involving allegations of a failure to bargain over changes in employee working conditions, the employer agency's defense that a "compelling need" exists for an agency regulation so as to bar negotiations over proposals inconsistent with the regulation, just as the Authority indisputably can resolve in an unfair labor practice proceeding other employer defenses to the bargaining obligation.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1715

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

ABERDEEN PROVING GROUND, DEPARTMENT OF THE ARMY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 16a), summarily reversing the decision of the Authority, is unreported. The court's earlier denial of the Authority's motion for hearing *en banc* (Pet. App. 17a) is unreported. The previous decision of the court of appeals (Pet. App. 52a-69a) involving the same question, and upon which the court's summary reversal was based, is reported at 762 F.2d 409; the court's denial of the petition for rehearing, in that case, with suggestion for rehearing *en banc* (Pet. App. 70a) is unreported. The decision and order of the Federal Labor Relations Authority (Pet. App. 18a-51a) is reported at 21 F.L.R.A. No. 100.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1987. The petition for a writ of certiorari was filed on April 24, 1987 and was granted on October 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. 7101-7135 (1982 & Supp. III 1985) are reproduced in the appendix to the petition (Pet. App. 1a-6a), and the relevant portions of the Authority's regulations (5 C.F.R. Parts 2423 and 2424) are reproduced in the appendix to the petition (Pet. App. 6a-15a).

STATEMENT

1. The Federal Service Labor-Management Relations Statute ("the Statute") governs labor-management relations in the federal service.[1] Under the Statute, the responsibilities of the Federal Labor Relations Authority ("the Authority") include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representational election matters, and resolving exceptions to arbitration awards. See 5 U.S.C. 7105(a)(1),(2); see also *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983). The Authority may also "take such other actions as are necessary

[1]The Statute was enacted as section 701 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.).

and appropriate to effectively administer the provisions of [the Statute]." 5 U.S.C. 7105(a)(2)(I). The Authority is also empowered to engage in formal rulemaking pursuant to 5 U.S.C. 7134, and to "provide leadership in establishing policies and guidance" relating to federal sector labor relations matters, pursuant to 5 U.S.C. 7105(a)(1). *BATF* v. *FLRA*, *supra*, 464 U.S. at 93. The Authority may petition for enforcement of its orders in appropriate United States courts of appeals. 5 U.S.C. 7123(b). Persons, including federal agencies, who are aggrieved by certain types of Authority orders may seek judicial review in the courts of appeals. 5 U.S.C. 7123(a).

a. Under the Statute, a federal agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment and, upon the request of either party, execute a document embodying the agreed upon terms. 5 U.S.C. 7103(a)(12), 7114(b)(2), 7114(b)(5). The Statute defines "conditions of employment" as "personnel policies, practices and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * * ." 5 U.S.C. 7103(a)(14). However, the Statute also expressly excludes certain matters from the general obligation to bargain. There is no duty to bargain over the rights the Statute reserves to management as nonnegotiable. 5 U.S.C. 7106. Further, there is no duty to bargain over proposed contract language which would bring about an inconsistency with a federal law, or with a government-wide rule or regulation. 5 U.S.C. 7117(a)(1).

As is relevant to this case, there is also no duty to bargain over proposed contract language which would bring about an inconsistency with either an agency regulation or a regulation of an agency's primary national subdivision whenever the Authority determines,

under the criteria set forth in 5 C.F.R. 2424.11, that a compelling need exists for the regulation. 5 U.S.C. 7117(a)(2), (a)(3). The employer agency which issued the regulation bears the burden of demonstrating to the Authority that the regulation in question satisfies one of the three criteria set out in the Authority's regulations for establishing compelling need. See 45 Fed. Reg. 3485 (1980).

b. Section 7117(b)(1) of the Statute empowers the Authority to resolve compelling need issues where, during the course of collective bargaining, "an exclusive representative alleges that no compelling need exists for any rule or regulation * * * which is then in effect and which governs any matter at issue in such collective bargaining." 5 U.S.C. 7117(b)(1). The Authority's regulations implementing this provision require that when an agency refuses to bargain over a proposal during ongoing collective bargaining negotiations because the proposal is alleged to be inconsistent with an existing agency-wide regulation for which a compelling need exists, and no actual or contemplated changes in conditions of employment are involved, the compelling need issue is resolved through the procedures in section 7117 of the Statute and Part 2424 of the Authority's regulations. 5 C.F.R. 2424.5 (Pet. App. 10a).

However, a different situation is presented where alleged unilateral changes in conditions of employment are involved. Section 7116(a)(5) makes it an unfair labor practice for an agency "to refuse to consult or negotiate in good faith with a labor organization as required by the [Statute]." 5 U.S.C. 7116(a)(5). As is relevant to this case, the bargaining obligation is specifically triggered whenever management seeks to initiate a change in conditions of employment of unit employees. See, *e.g.*, *FLRA* v. *Social Security Administration*, 753 F.2d

156 (D.C. Cir. 1985); cf. *NLRB* v. *Katz*, 369 U.S. 736 (1962) (under the National Labor Relations Act). In this connection, the Authority has consistently held that an agency violates the obligation to bargain when it unilaterally institutes a change in conditions of employment without notification to or bargaining with the employees' exclusive bargaining representative. See *FLRA* v. *United States Department of the Air Force, Tinker Air Force Base*, 735 F.2d 1513, 1515 n.5 (D.C. Cir. 1984). See also, *e.g.*, *Veterans Administration West Los Angeles Medical Center, Los Angeles, California*, 24 F.L.R.A. (No. 73) 714 (Dec. 22, 1986); *Internal Revenue Service, Western Region, San Francisco, California*, 11 F.L.R.A. 655 (1983); *Department of the Air Force, Scott Air Force Base, Illinois*, 5 F.L.R.A. 9 (1981).

To resolve disputes involving an employing agency's alleged unilateral changes in conditions of employment, where issues of negotiability—including, as in the instant case, assertions of compelling need for agency regulations—are raised as affirmative defenses, the Authority has promulgated specific procedures. These procedures recognize a union's right either: (1) to seek resolution of the entire dispute, including the negotiability issues, in the unfair labor practice forum; or (2) to seek initial and separate resolution of the negotiability issues in the negotiability appeal forum. 5 C.F.R. 2423.5 and 2424.5 (Pet. App. 6a-7a, 10a).

2. On September 15, 1981, Aberdeen Proving Ground ("Aberdeen" or "the agency") met with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO ("the union") and informed the union of its decision to curtail operations of Aberdeen on the day after Thanksgiving, and that employees would be placed on "forced annual leave" for that day (Pet. App. 19a). The union sought to

negotiate concerning the impact of Aberdeen's decision to curtail its operations and to negotiate the procedures leading to its implementation (Pet. App. 19a). During negotiations held in October, the union presented, among other things, two proposals to grant administrative leave to all employees during the closure of Aberdeen's operations, rather than, as decided by Aberdeen, to place employees on forced annual leave (Pet. App. 19a).

Aberdeen refused to bargain on these proposals, stating that Department of Defense (Defense) and Department of the Army (Army) regulations precluded a grant of administrative leave for an anticipated closure of operations (Pet. App. 19a).[2] The negotiation sessions ended, and at no time prior to the closing did Aberdeen rescind its refusal to bargain over the union's proposals (Pet. App. 19a).

The Authority's General Counsel issued an unfair labor practice complaint alleging that Aberdeen's refusal to negotiate over the union's administrative leave proposals was a failure to negotiate in good faith with the union in violation of the Statute (Pet. App. 34a). The complaint was heard before an Authority Administrative Law Judge (ALJ) who concluded in his recommended decision and order that, among other things, Aberdeen had no duty to bargain over the union's proposal regarding the granting of administrative leave because the Authority had not previously determined that there was no compelling need for the agency regulations with which the union's proposals were inconsistent (Pet. App. 45a).

[2] These regulations are referred to as "agency" regulations, although the Army regulation (as opposed to a Department of Defense regulation) is a regulation of a "primary national subdivision." See 5 U.S.C. 7117(a)(2).

3.a. After issuance of the ALJ's recommended decision, but prior to the Authority's decision in this case, the Authority in *Defense Logistics Agency,* 12 F.L.R.A. 412 (1983) had its first occasion to examine the contention that the issue of a compelling need for an agency regulation could never be resolved in an unfair labor practice proceeding. In that case the Authority noted that it had issued regulations (5 C.F.R. 2423.5 and 2424.5) which concern the Authority's statutory authority to resolve disputes involving alleged unilateral changes in conditions of employment where issues of negotiability are also raised. *Defense Logistics Agency,* 12 F.L.R.A. at 415. The Authority noted that in such cases the Authority's regulations allow the labor organization to seek resolution of the negotiability issues by filing both an unfair labor practice charge and a negotiability appeal, but that the regulations also require the labor organization to select the forum in which to proceed first. *Ibid.* As applied to the dispute at hand, the Authority stated that if the union has selected the unfair labor practice forum in which to proceed, and if the negotiability issue in the case involves an agency assertion that a compelling need exists for the agency regulation, then the compelling need issue must perforce be decided in the unfair labor practice proceeding. *Defense Logistics Agency,* 12 F.L.R.A. at 416.

b. The D.C. Circuit enforced this decision of the Authority in *Defense Logistics Agency* v. *FLRA,* 754 F.2d 1003 (D.C. Cir. 1985). The court examined the language and legislative history of the Statute, but did not find that they conclusively resolved the dispute over whether the Authority was empowered to resolve compelling need negotiability issues in unilateral change unfair labor practice cases where the compelling need issue arises as part of an agency's affirmative defense.

754 F.2d at 1007-1008. The court then examined the Executive Order practice which predated the Statute. 754 F.2d at 1008-1011. The court noted that under the Executive Order, the Assistant Secretary of Labor for Labor-Management Relations (the office which had the responsibility of resolving unilateral change unfair labor practice cases in the federal sector) was authorized to resolve any negotiability issues necessary to the resolution of such a case without first referring the negotiability issues to the Federal Labor Relations Council. 754 F.2d at 1009-1011. The court noted that this jurisdiction of the Assistant Secretary to decide negotiability issues in unilateral change unfair labor practice cases was an exception to the general requirement that negotiability appeals were to be filed directly with the Council. 754 F.2d at 1010-1011. The court concluded that, while not compelled, it was more natural, in applying this practice to the resolution of compelling need issues, to read "negotiability" as meaning all aspects of negotiability, including compelling need. 754 F.2d at 1011.

The D.C. Circuit found further that the reasonableness of the Authority's construction of the Statute was additionally supported by the fact that it streamlined and shortened the dispute resolution process. 754 F.2d at 1011. Further, the court found that the Authority's construction provided a forum in which a remedy for the refusal to bargain in unilateral change cases can be fashioned if no compelling need is found for the regulation. *Ibid.* Accordingly, noting the standard in *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), for judicial review of an agency construction of its enabling act once it has been determined that Congress did not directly address the precise question of statutory construction at issue, the court concluded the Authority's construction was

"not only a permissible reading of the Statute, but also a reasonable one, in the truest sense — namely, that the Authority had good reasons for reading the Statute in that way." 754 F.2d at 1014.

4. The propriety of the Authority's resolution of a compelling need issue as part of a unilateral change unfair labor practice case was next reviewed in the Fourth Circuit in *United States Army Engineer Center, Fort Belvoir* v. *FLRA*, 762 F.2d 409 (4th Cir. 1985) *(Fort Belvoir)* (Pet. App. 52a-69a). The Fourth Circuit disagreed with the Authority and the D.C. Circuit. The court found, principally, that the Authority's construction was at variance with the "plain language" of Section 7117 which states, in part, that the duty to bargain extends to an agency rule or regulation *"only if* the Authority *has determined under subsection (b) of this section"* that no compelling need exists for the rule or regulation (Pet. App. 60a) (emphasis in original). The court stated these words in the Statute "are those of condition precedent" and that it "is clear that any duty to bargain on the employer's part arises only after the FLRA *'has determined'* that no compelling need for the disputed regulation exists" (Pet. App. 61a) (emphasis in original). The court concluded that "[i]t is illogical, in light of this language, to maintain that a union could charge an agency with 'having engaged in or engaging in an unfair labor practice,' 5 U.S.C. § 7118(a), because the employer has refused to bargain over subject matter as to which no duty to bargain *has been determined* to exist" (Pet. App. 61a) (emphasis in original).

The Authority petitioned for rehearing of the court's decision, with suggestion for rehearing *en banc*. The court denied both on July 26, 1985 (Pet. App. 70a).

5.a. Given the conflict between the D.C. and the Fourth Circuits, when the Authority issued its decision in the instant case (Pet. App. 18a-32a), it reexamined the

propriety of the Authority's resolving an agency's compelling need defense as part of a unilateral change unfair labor practice case. The Authority considered the consistency of its prior holdings with the terms of the Statute and with the Authority's own regulations (5 C.F.R. 2423.5 and 2424.5) (Pet. App. 21a-24a). The Authority compared its resolution of the compelling need issues in such an unfair labor practice case with its practice of resolving in unilateral change unfair labor practice cases all the other various defenses of nonnegotiability, *i.e.*, defenses involving the other bases set out in the Statute for rendering matters nonnegotiable (Pet. App. 23a-24a). The Authority considered its practice in light of the legislative history of the Statute and in light of the experience under the Executive Order and found support for the continuation of the Authority's practice (Pet. App. 24a-25a). The Authority weighed considerations of public policy and found that, in those cases where no compelling need is found to exist, the Authority's practice promotes the collective bargaining process by resolving all relevant issues in one proceeding (thereby obviating the delay inherent in two separate and consecutive proceedings) and it affords the union access to a remedy for the agency's failure to bargain (Pet. App. 25a-26a). Moreover, the Authority noted that its practice fully preserves an agency's right not to negotiate in those cases where the agency's assertion of a compelling need is upheld (Pet. App. 25a-26a). As a result of this reexamination, the Authority reaffirmed its conclusion that the Authority can properly resolve the merits of an agency's compelling need defense for an agency regulation in a unilateral change unfair labor practice case (Pet. App. 26a).

b. In connection with the particular compelling need issue involved in the instant case, the Authority concluded that Aberdeen had failed to sustain its burden

of establishing, in accordance with the Authority's criteria in 5 C.F.R. 2424.11, a compelling need for the Defense and Army regulations (Pet. App. 27a). The Authority noted that Aberdeen had argued that there was a compelling need for the regulations because they were essential to meet its objective in curtailing operations, which was to conserve energy (Pet. App. 27a). However, the Authority found that Aberdeen had failed to establish how the granting of administrative, rather than annual, leave in any way affected Aberdeen's stated objective of conserving energy (Pet. App. 27a). The Authority noted that Aberdeen's operations would be curtailed to the same extent, and energy conserved to the same extent, whether the employees affected were on annual leave or administrative leave on the day in question (Pet. App. 27a).

Accordingly, the Authority concluded that Aberdeen violated Section 7116(a)(1) and (5) of the Statute when it refused to bargain concerning the union's proposal to grant employees administrative leave on the day after Thanksgiving, submitted in response to Aberdeen's notice that operations would be curtailed on that date (Pet. App. 28a). Among other things, the Authority ordered Aberdeen to bargain concerning the union's proposal to grant administrative leave in lieu of forced annual leave for November 27, 1981 (Pet. App. 29a).

c. Aberdeen petitioned for review of the Authority's decision in the Fourth Circuit. The court, after full briefing by the parties, which included a motion by the Authority that the court hear the case *en banc*, denied the Authority's motion that the case be heard *en banc* (Pet. App. 17a). Subsequently, Aberdeen moved the court to reverse summarily the Authority's decision because it was in conflict with the court's earlier

decision in *Fort Belvoir.* On January 28, 1987, the Fourth Circuit granted Aberdeen's motion and summarily reversed the Authority's decision "on the authority of *U.S. Army Engineer Ctr., Fort Belvoir v. FLRA*, 762 F.2d 409 (4th Cir. 1985)" (Pet. App. 16a).[3]

SUMMARY OF ARGUMENT

The Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135, requires a federal agency to bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment. This statutory bargaining obligation is a broad one; however, the Statute also enumerates several exclusions from the duty to bargain. Bargaining proposals which would bring about an inconsistency with federal law or government-wide regulations, for example, are rendered nonnegotiable by Section 7117(a)(1) of the Statute; Section 7117(c) establishes a procedure for resolving negotiability disputes involving these and other allegations of nonnegotiability. Bargaining proposals which would bring about an inconsistency with an agency regulation for which the Authority determines there is a compelling need are rendered nonnegotiable by Section 7117(a)(2); Section 7117(b) establishes a procedure for resolving this particular kind of negotiability dispute.

Both the Section 7117(c) and Section 7117(b) procedures are the procedures in which the Authority resolves cases "which solely involve an agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained and which do not involve actual or contemplated changes in

[3] Given the court's exclusive reliance on its earlier decision in *Fort Belvoir*, references to the court's decision below will be references to ~~the court's decision will be references to~~ the court's decision in *Fort Belvoir*.

conditions of employment" (5 C.F.R. 2424.5). However, the Authority has determined that a different situation is presented where alleged unilateral changes in conditions of employment are involved. Because the Statute, like the National Labor Relations Act in the private sector, imposes a "continuing obligation to bargain" which "remains throughout the parties' ongoing relationship," (*FLRA* v. *United States Department of the Air Force, Tinker Air Force Base*, 735 F.2d 1513, 1516 (D.C. Cir. 1984)), it is a basic tenet of labor law that an employer assumes the risk of having breached that bargaining obligation whenever the employer unilaterally changes working conditions without bargaining. It is also well established that if it subsequently can be shown that the employer changed working conditions but refused to bargain over matters which were properly within the bargaining obligation, an unfair labor practice has been committed. See *e.g.*, *NLRB* v. *Katz*, 369 U.S. 736 (1962) (private sector); *FLRA* v. *Social Security Administration*, 753 F.2d 156 (D.C. Cir. 1985) (federal sector).

Hence, while Congress provided a procedure in Section 7117(b) of the Statute for use with respect to resolving compelling need issues (just as Congress provided a procedure in Section 7117(c) for use with respect to resolving other negotiability issues), there is no indication in the Statute or in its legislative history that Congress intended either of these procedures to foreclose resolution of defenses of nonnegotiability, including compelling need issues, in unilateral change unfair labor practice cases. Indeed, Aberdeen has not contested that negotiability disputes that are otherwise resolved under the Section 7117(c) procedure can appropriately be resolved in unilateral change unfair labor practice cases when they arise as agency defenses in the case. And

nothing in the legislative history indicates a congressional desire to have the Statute depart from this practice in those situations where the employer's particular defense of nonnegotiability involves an assertion that an agency regulation bars bargaining, as opposed to an assertion, for example, that a government-wide regulation bars bargaining.

However, in *Fort Belvoir* (Pet. App. 52a-69a), the court below incorrectly concluded—in conflict with the D.C. Circuit's decision in *Defense Logistics Agency* v. *FLRA*, 754 F.2d 1003 (D.C. Cir. 1985)—that the Statute prohibits the Authority from resolving, in a unilateral change unfair labor practice case, the particular agency defense of nonnegotiability involving an assertion that an agency regulation (for which there is a compelling need) bars bargaining. Moreover, the court went even further and concluded that an agency's simple assertion of the compelling need defense in a unilateral change unfair labor practice case postpones the duty to bargain from arising until the Authority, in a separate negotiability proceeding, determines there is no compelling need for the agency regulation. It is incorrect for the court below to have concluded that Congress intended the Statute to provide that an agency assertion of compelling need for an agency regulation, and a meritless one at that, should be allowed to disrupt the bargaining obligation in unilateral change cases whe. Congress also intended that agency regulations be one of the Statute's least restrictive bars to bargaining.

The Authority's construction of the Statute, as allowing negotiability disputes otherwise processed under Section 7117(b) to be resolved in unilateral change unfair labor practice cases when they are raised as agency defenses (just as are those negotiability disputes otherwise processed under Section 7117(c)), is not only

consistent with well-established principles of labor law, and with the Authority's regulations, but it continues the Executive Order practice which predated the Statute and of which Congress was aware. When Congress determined that agency regulations should preclude bargaining if a compelling need exists for the regulation, and when Congress established a direct and separate procedure for resolving such negotiability disputes, Congress continued both the negotiability standard and the direct appeals procedure developed under the Executive Order program. The Executive Order program also allowed any negotiability issue, when raised as an affirmative defense by an agency in a unilateral change unfair labor practice case, to be resolved as part of that case. In the absence of any indication from Congress in the Statute's legislative history that Congress intended to depart from either basic precepts of labor law or from established Executive Order practice, the Authority's construction of the Statute properly continues this practice. See *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 103-104, 107 (1983).

Finally, regardless whether the Section 7117(b) procedure or the unfair labor practice procedure is used to determine the merits of an assertion of a compelling need for an agency regulation, the outcome of that determination would be the same. In either forum, the merits are decided by the Authority; the agency's burden of proof in demonstrating a compelling need for the regulation is the same; judicial review is equally available from the Authority's decision; and if a compelling need is found, the agency is under no obligation to bargain over proposals which conflict with the regulation.

Although the outcome of the compelling need determination would be the same in either forum, unified processing of compelling need issues in an unfair labor

practice case does provide certain distinct advantages. By providing for the resolution of all relevant issues in one proceeding, unified processing streamlines and shortens the entire dispute resolution process in unilateral change unfair labor practice cases. In addition, in those cases where the agency regulation is found not to have a compelling need, and therefore not to be a bar to bargaining, unified processing of the compelling need issue in the unfair labor practice case affords a forum, and access to a remedy, that can provide some form of retroactive relief where management is found to have changed conditions of employment without fulfilling its collective bargaining obligation. The various policy considerations supporting the Authority's construction of the Statute prompted the D.C. Circuit to conclude that the Authority's construction is "not only a permissible reading of the Statute, but also a reasonable one, in the truest sense—namely, that the Authority had good reasons for reading the Statute in that way." *Defense Logistics Agency* v. *FLRA*, *supra*, 754 F.2d at 1014.

ARGUMENT

THE FEDERAL LABOR RELATIONS AUTHORITY IS EMPOWERED TO RESOLVE, IN AN UNFAIR LABOR PRACTICE PROCEEDING INVOLVING ALLEGATIONS OF A FAILURE TO BARGAIN OVER CHANGES IN EMPLOYEE WORKING CONDITIONS, THE EMPLOYER AGENCY'S DEFENSE THAT A "COMPELLING NEED" EXISTS FOR AN AGENCY REGULATION SO AS TO BAR NEGOTIATIONS OVER PROPOSALS INCONSISTENT WITH THE REGULATION, JUST AS THE AUTHORITY INDISPUTABLY CAN RESOLVE IN AN UNFAIR LABOR PRACTICE PROCEEDING OTHER EMPLOYER DEFENSES TO THE BARGAINING OBLIGATION

Under the Federal Service Labor-Management Relations Statute, a federal agency is required to bargain

in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment. 5 U.S.C. 7103(a)(12), 7114(b). The Statute defines "conditions of employment" broadly, to include "personnel policies, practices and matters, whether established by rule, regulation, or otherwise, affecting working conditions • • •." 5 U.S.C. 7103(a) (14). See *EEOC* v. *FLRA*, 744 F.2d 842, 845 (D.C. Cir. 1984), cert. dismissed, 106 S. Ct. 1678 (1986); *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1143 n.2 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982). Consistent with this bargaining obligation, the Authority has long applied the principle that an agency is required to bargain over a matter which is encompassed within the definition of conditions of employment to the extent of the agency's discretion, that is, its authority to take action[4] or to recommend action.[5]

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[4]See *NTEU, Chapter 6 and IRS, New Orleans District*, 3 F.L.R.A. 748, 759-760 (1980). See also, *e.g.*, *Overseas Education Association and Department of Defense Dependents Schools*, 27 F.L.R.A. (No. 71) 492, 535-536 (June 24, 1987) (agency obligated to negotiate over discretion to continue to pay living quarters allowance while an employee is in nonpay status), petition for review filed on other matters *sub nom. Overseas Education Association* v. *FLRA*, No. 87-1279 (D.C. Cir. June 25, 1987); *NTEU and IRS*, 27 F.L.R.A. (No. 25) 132, 137 (May 29, 1987) (agency obligated to negotiate over discretion to establish rates of performance incentive payments).

See generally 124 Cong. Rec. 29187 (1978) (statement of Rep. Clay), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 933 (Comm. Print No. 96-7) (*Legis. Hist.*); 124 Cong. Rec. 29199 (1978) (statement of Rep. Ford), *reprinted in Legis. Hist.* at 956-957.

[5]*Library of Congress* v. *FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983).

The Statute also specifies several exclusions from the duty to bargain. For example, the duty to bargain does not encompass proposals that would bring about an inconsistency with federal law or with government-wide regulation (5 U.S.C. 7117(a)) or proposals that improperly intrude on the authority of management officials of an agency to exercise the rights enumerated in Section 7106(a) of the Statute (5 U.S.C. 7106(a)). *Department of Defense* v. *FLRA*, *supra*, 659 F.2d at 1143 n.3, 1146. Section 7117(c) of the Statute establishes a procedure for resolving these negotiability disputes. The Statute also removes from the bargaining obligation proposals which would bring about an inconsistency with agency regulations for which there is a "compelling need" (5 U.S.C. 7117(a) (2)), and Section 7117(b) of the Statute establishes a procedure for resolving this particular kind of negotiability dispute.

In *Fort Belvoir*, the court read into the existence of the Section 7117(b) appeal procedure a prohibition on the Authority's resolving, in a unilateral change unfair labor practice case, the employer agency defense of nonnegotiability based upon an assertion of compelling need for an agency regulation, the negotiability determination otherwise made under the Section 7117(b) procedure. The court's conclusion is in marked contrast to the accepted resolution of other employer defenses of nonnegotiability in unilateral change unfair labor practice cases, matters otherwise resolved under the Section 7117(c) procedure. The court goes even further, however, and concludes that an agency's simple assertion of the compelling need defense in a unilateral change unfair labor practice case postpones the duty to bargain from arising until the Authority, in a separate negotiability proceeding, concludes there is no compelling need for the agency regulation.

This interpretation of the Statute by the court below disregards one of the most basic tenets in both federal sector and private sector labor law—that an employer's decision to change working conditions triggers a bargaining obligation, and that if it subsequently can be shown that the employer refused to bargain over matters which are properly within that bargaining obligation, an unfair labor practice has been committed. See, *e.g.*, *NLRB* v. *Katz*, 369 U.S. 736 (1962) (private sector); *FLRA* v. *Social Security Administration*, 753 F.2d 156 (D.C. Cir. 1985) (federal sector); *FLRA* v. *United States Department of the Air Force, Tinker Air Force Base*, 735 F.2d 1513 (D.C. Cir. 1984) (federal sector). It is incorrect to conclude, as the court did below, that Congress intended that an agency assertion of compelling need for an agency regulation, and a meritless one at that, should be allowed to disrupt the bargaining obligation in unilateral change cases when Congress also intended that agency regulations be one of the Statute's least restrictive bars to bargaining. The decision of the court below, which reversed the Authority, and which is in conflict with the D.C. Circuit's decision in *Defense Logistics Agency* v. *FLRA*, *supra*, 754 F.2d 1003, should be reversed.

A. Only agency regulations for which the Authority determines a compelling need exists, under the Authority's criteria established in 5 C.F.R. 2424.11, can bar negotiations over inconsistent bargaining proposals

Employer agencies may not assert their own internal regulations as bars to bargaining unless the regulations are supported by a "compelling need." 5 U.S.C. 7117(a) (2); 5 C.F.R. 2424.11. The Authority is charged by Section 7117(a) (2) with prescribing regulations to be used in determining whether a compelling

need exists for agency regulations. The Authority is also charged by Section 7117(b) (1) with making the particular determinations as to whether a compelling need exists for an agency's regulation so as to bar negotiation over inconsistent proposals. Hence, whereas all government-wide regulations are a bar to bargaining over matters which would bring about an inconsistency with those regulations, the only agency regulations which act as a bar to bargaining are those for which the Authority finds a compelling need. 5 U.S.C. 7117(a) (1), (2).

1. When Congress stated in Section 7117(a) (2) that agency regulations for which the Authority finds a compelling need should act as a bar to bargaining over inconsistent bargaining proposals, Congress continued the particular negotiability bar formulated under the pre-Statute program for labor-management relations in the federal service, Executive Order 11491, as amended.

However, when Executive Order 11491 was first promulgated in 1969, it barred negotiation over proposals inconsistent with all "published agency policies and regulations," regardless of compelling need.[6] Such a broad bar to bargaining soon proved overly proscriptive and was deemed unsatisfactory. As stated in the 1975 Report of the Federal Labor Relations Council, the body which administered the Executive Order program: "Experience under the Order, as well as testimony during the current review, establishes that, while considerable progress toward a wider scope of negotiation at the local level has been effected * * * meaningful negotiations at the local level * * * have been unnecessarily constricted in a significant number of instances by higher level agency

[6] Executive Order 11491, § 11(a), 3 C.F.R. 867 (1966-1970 comp.), *reprinted in Legis. Hist.* at 1250.

regulations not critical to effective agency management or the public interest."[7]

As a result, Executive Order 11838 (3 C.F.R. 957 (1971-1975 comp.)) (promulgated in 1975 to implement the recommendations of the 1975 Council Report by amending Executive Order 11491, as amended) effected notable change to this barrier to negotiations. It removed agency regulations as a general bar to bargaining over inconsistent proposals and provided instead that only those agency regulations for which the Council determined that a compelling need existed, and which were issued at the agency headquarters level or at the level of a primary national subdivision were to bar bargaining over inconsistent proposals.[8] Further, and as had been the practice with respect to the resolution of the other types of negotiability disputes, Executive Order 11838 also introduced a direct appeal procedure to the Council for determining whether an agency's regulation met the compelling need standard, so as to bar negotiation over inconsistent proposals.[9] Finally, the Council promulgated specific criteria for

[7] Labor-Management Relations in the Federal Service January 1975: Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491, as Amended (1975 Council Report) at 38 (App. 3a, *infra*), *reprinted in Legis. Hist.* at 1306-1307. Copies of the 1975 Council Report have been lodged with the Clerk of the Court, and relevant portions are also reprinted in the appendix to this brief.

[8] See 1975 Council Report at 37-40, *reprinted in Legis. Hist.* at 1304-1311 (App. 1a-10a, *infra*).

[9] Under this procedure, the Council would consider an appeal from a labor organization that an agency regulation bars negotiation "only if the labor organization has first requested an exception to the regulation from the agency head and that request has been denied." 1975 Council Report at 37, *reprinted in Legis. Hist.* at 1304-1305 (App. 1a, *infra*). According to the 1975 Council Report, this prerequisite for an appeal was proposed because "some negotiability disputes involving the validity of agency

determining whether there was a compelling need for any given agency regulation.[10]

2. In Congress' deliberations over the various bills that ultimately resulted in the enactment of the Statute, the Senate bill, as reported by the Senate Committee on Governmental Affairs and then passed by the Senate, would have continued the Executive Order program's approach with respect to agency regulations, barring negotiation over proposals inconsistent only with those agency regulations for which the Authority found a compelling need.[11]

On the other hand, the bill reported by the House Committee on Post Office and Civil Service would have removed all agency regulations as a barrier to negotiation. That is, it would have broadened the duty to bargain by allowing, for the first time, bargaining over the terms of every agency regulation.[12] Further, under the House Committee bill, even proposals inconsistent with government-wide regulations were negotiable as long as the Authority found the government-wide regulation was not supported by a "compelling need."[13] Thus, the House Committee bill would have retained the Executive Order concept of "compelling need," but only for evaluating whether to

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regulations have been brought to the Council without an attempt first to seek exceptions to the agency regulations." 1975 Council Report at 40, *reprinted in Legis. Hist.* at 1310 (App. 8a, *infra*). As a result, the Council was "of the opinion that the failure of the parties to explore the opportunity of an exception to a higher level agency regulation determined by the agency head to bar negotiations, before recourse to the Council, reflects a disservice to the purposes of the Federal labor-management relations program." *Ibid.*

[10] See 5 C.F.R. 2413.2 (1978).

[11] S. 2640, 95th Cong., 2d Sess. § 7215(c) (1978), *reprinted in Legis. Hist.* at 521.

[12] H.R. 11280, 95th Cong., 2d Sess. § 7117(a)(1) (1978), *reprinted in Legis. Hist.* at 409.

[13] *Id.* at §7117(a) (2).

allow negotiation over proposals inconsistent with the terms of *government-wide* rules and regulations.[14]

By the time the full House considered the House Committee bill, the Senate bill had already passed the Senate with its bar to bargaining over agency regulations for which the Authority found a compelling need.[15] On September 13, 1978, on the House floor, Congressman Udall offered for full House consideration a substitute amendment[16] which the House passed [17] and which, in this area, ultimately became the terms of the enacted Statute.

The Udall substitute continued the Executive Order approach to bargaining in this area, the approach which

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[14] In articulating the approach the Authority was to take in formulating the "compelling need" criteria called for by section 7117(a) (2), the House Committee Report stated:

> The Authority is to prescribe by regulation the criteria for determining "compelling need." The committee intends that the criteria be similar to those promulgated by the Federal Labor Relations Council to determine "compelling need" for agency-wide regulations under the Executive order program, with the Authority's determination to be based primarily on whether there is a demonstrated, and justified, and overriding need for Government-wide uniformity in the matter covered by the rule or regulation.

H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 51 (1978), *reprinted in Legis. Hist.* at 697.

[15] 124 Cong. Rec. 27593 (Aug. 24, 1978), *reprinted in Legis. Hist.* at 1038.

[16] 124 Cong. Rec. 29174 (1978), *reprinted in Legis. Hist.* at 907.

[17] 124 Cong. Rec. 29203, 29221 (1978), *reprinted in Legis. Hist.* at 963, 966.

also was reflected in the Senate bill.[18] It allowed negotiations over those agency regulations for which the Authority found no compelling need, but it prohibited negotiations over proposals which would bring about an inconsistency with government-wide regulations.[19] The Udall substitute, however, did contain two specific changes from the Executive Order approach, in the direction of broader bargaining rights. First, if a collective bargaining agreement contained a provision which conflicts with an agency regulation, including a regulation for which a compelling need exists, the Udall substitute made it an unfair labor practice for an agency to enforce the regulation if the agreement was in effect before the date the regulation was prescribed.[20] Second, the Udall substitute specified that a regulation for which a compelling need may exist cannot restrict bargaining where the bargaining unit is comprised of a majority of the agency's or, in the case of a regulation issued by a primary national subdivision, the subdivision's employees.[21]

3. Upon enactment of the Statute, the Authority was called upon by Section 7117(a)(2) to formulate the criteria it would use in determining whether a

[18] See also 124 Cong. Rec. 29199 (1978) (statement of Rep. Ford) ("The compromise position in section 7117 was accepted with the understanding that * * * the compelling need test will be permitted to be raised in only a limited number of cases."), *reprinted in Legis. Hist.* at 956.

[19] Compare section 7117(a)(2) (124 Cong. Rec. 29178 (1978), *reprinted in Legis. Hist.* at 915) with 5 U.S.C. 7117(a)(2).

[20] Compare section 7116(a)(7) (124 Cong. Rec. 29178 (1978), *reprinted in Legis. Hist.* at 915) with 5 U.S.C. 7116(a)(7).

[21] Compare section 7117(a)(3) (124 Cong. Rec. 29178 (1978), *reprinted in Legis. Hist.* at 915-916) with 5 U.S.C. 7117(a)(3). See also *Association of Civilian Technicians, Montana Air Chapter* v. *FLRA*, 756 F.2d 172, 176-178 (D.C. Cir. 1985).

compelling need existed for an agency regulation so as to bar negotiation over inconsistent proposals. In its regulations, the Authority has adopted three such criteria.[22] First, if a regulation is "essential, as distinguished from helpful or desirable," to the accomplishment of the agency mission in a manner consistent with the requirements of an effective and efficient government, the Authority will find a compelling need. 5 C.F.R. 2424.11(a). Second, if a regulation is "necessary to insure the maintenance of basic merit principles," the Authority will find a compelling need. 5 C.F.R. 2424.11(b). Third, if a regulation implements an "essentially nondiscretionary" mandate from "law or other outside authority," the Authority will find a compelling need. 5 C.F.R. 2424.11(c).

Further, when the Authority adopted the specific compelling need criteria, the Authority also specified that the burden of demonstrating a compelling need rests with the employer agency. 45 Fed. Reg. 3485 (1980). The agency carries this burden because it has the greatest familiarity with the circumstances under which the regulation was issued and the purpose it was designed to serve. See *AFGE, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania*, 2 F.L.R.A. 451, 454 (1980). The agency must produce the necessary facts and arguments to support its compelling need claim, as the Authority is not in a position on its own to determine the purposes the regulations are designed to achieve or their importance to the agency. *AFGE, Local 3804*

[22] There were five compelling need criteria under the Executive Order program. 5 C.F.R. 2413.2 (1978). The Authority's first criterion subsumes three criteria from the Executive Order program, and the Authority's second and third criteria continue the other two criteria developed under the Executive Order program. See 45 Fed. Reg. 3485 (1980).

and Federal Deposit Insurance Corporation, Madison Region, 21 F.L.R.A. (No. 104) 870, 881 (May 19, 1986). Generalized and conclusionary reasoning does not support a finding of compelling need. *Ibid.* Accordingly, it is now well-settled that to establish that a proposal is nonnegotiable on the basis of compelling need, an agency must identify a specific agency regulation; show that there is a conflict between its regulation and the proposal; and bear the burden of coming forward with the necessary affirmative support for its assertion that the regulation satisfies one of the Authority's compelling need criteria.

As a consequence of both the fact that only those agency regulations for which there is a compelling need bar bargaining and the fact that the compelling need test is a stringent one, agency regulations are one of the Statute's least restrictive bars to bargaining. Of the 85 Authority decisions, issued over a period of slightly more than four years,[23] that counsel for the Authority have identified as addressing an employer agency's contention that an agency regulation should be found to have a compelling need so as to bar bargaining, in 12 decisions the Authority found a compelling need.[24] To date, no court has ruled on

[23] These 85 decisions were issued during the period from July 29, 1983 (the date of the Authority's lead decision concerning the issue in this case (*Defense Logistics Agency*, 12 F.L.R.A. 412 (see page 7, *supra*))) through the end of fiscal year 1987.

[24] Five of the 12 cases concern findings of compelling need for various Defense Department regulations which specify and regulate, pursuant to congressional direction (thereby satisfying the third compelling need criterion, 5 C.F.R. 2424.11(c)), the use of government quarters by employees during their travel status or temporary duty (*e.g., NFFE, Local 1669 and Arkansas Air National Guard*, 17 F.L.R.A. 179 (1983), affirmed *sub nom.*

an Authority finding of no compelling need for an agency regulation.[25]

B. The Authority's construction of the Statute implements the well-established principle that if it subsequently can be shown that an employer changed working conditions but refused to bargain over matters which were properly within the bargaining obligation, the employer has committed an unfair labor practice

As the Authority stated in its decision in this case (Pet. App. 21a), Section 7117(b) of the Statute empowers

NFFE, Local 1669 v. *FLRA*, 745 F.2d 705 (D.C. Cir. 1984)). Three of the 12 cases, again pursuant to the third compelling need criterion (5 C.F.R. 2424.11(c)), concern findings of compelling need for aspects of National Guard Bureau regulations which link retention and promotion rights for civilian technicians to their military position and performance (*e.g., NAGE, Local R14-87 and Kansas National Guard, Topeka, Kansas*, 18 F.L.R.A. 736 (1985)).

In the final 4 cases, the Authority has since altered its original finding of compelling need. See *NAGE, Local R14-62 and U.S. Army Dugway Proving Ground, Dugway, Utah*, 26 F.L.R.A. (No. 7) 59 (Mar. 6, 1986) (reversing *NAGE, Local R14-62 and U.S. Army Dugway Proving Ground, Dugway Utah*, 18 F.L.R.A. 307 (1985) and *NAGE, Local R14-9 and U.S. Army Dugway Proving Ground, Dugway, Utah*, 18 F.L.R.A. 344 (1985)) (compelling need not found under section 2424.11(a) because demonstration of monetary savings alone is not sufficient to establish that a regulation is essential, as distinguished from helpful or desirable). And see *NTEU, Chapter 207 and FDIC*, 28 F.L.R.A. (No. 80) 625 (Aug. 21, 1987) (motion for reconsideration denied in 29 F.L.R.A. No. 120 (Nov. 6, 1987) (reversing, as law of the case (pursuant to *NTEU* v. *FLRA*, 813 F.2d 472 (D.C. Cir. 1987)) *NTEU Chapter 207 and FDIC*, 21 F.L.R.A. (No. 36) 282 (Apr. 14, 1986) and *NTEU Chapter 207 and FDIC*, 14 F.L.R.A. 598 (1984)), petition for review filed *sub nom. FDIC* v. *FLRA*, No. 87-1596 (D.C. Cir. petition filed Oct. 19, 1987).

[25] Pending are petitions for review where the employer agencies in their briefs have raised compelling need issues. *United*

the Authority to resolve compelling need issues where, during the course of collective bargaining, "an exclusive representative alleges that no compelling need exists for any rule or regulation * * * which is then in effect and which governs any matter at issue in such collective bargaining." 5 U.S.C. 7117(b)(1). Further, as the Authority also noted (Pet. App. 22a-23a), the Authority's regulations implementing this provision require that when such a negotiability dispute arises, and when no actual or contemplated changes in conditions of employment are involved, the compelling need issue be resolved through the negotiability procedures in Section 7117 of the Statute and Part 2424 of the Authority's regulations. 5 C.F.R. 2424.5 (Pet. App. 10a).

However, the Authority properly concluded that a different situation is presented where alleged unilateral changes in conditions of employment are involved. Because the Statute, like the National Labor Relations Act, imposes a "continuing obligation to bargain" which "remains throughout the parties' ongoing relationship," (*FLRA* v. *United States Department of the Air Force, Tinker Air Force Base, supra*, 735 F.2d

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States Department of Defense Dependent Schools, Fort Bragg, North Carolina v. *FLRA*, Nos. 87-3061, 87-7226 (4th Cir. Apr. 27, 1987) [reviewing decision and order in 25 F.L.R.A. (No. 96) 1132 (Feb. 27, 1987)]; *Fort Knox Dependent Schools* v. *FLRA*, Nos. 87-3395, 87-3524 (6th Cir. Apr. 27, 1987) [reviewing decision and order in 25 F.L.R.A. (No. 95) 1119 (Feb. 27, 1987)]; *Department of the Navy, Navy Exchange, Pearl Harbor* v. *FLRA*, Nos. 87-7161, 87-7226 (9th Cir. Apr. 17, 1987) [reviewing decision and order in 25 F.L.R.A. (No. 65) 796 (Feb. 19, 1987)], now consolidated with *Department of the Navy, Marine Corps Exchange, Pearl Harbor, et al.* v. *FLRA*, Nos. 87-7220, 87-7276 (9th Cir. May 21, 1987) [reviewing decision and order in 26 F.L.R.A. (No. 47) 613 (Mar. 25, 1987)].

at 1516), it is a basic tenet of labor law that an employer assumes the risk of having breached that bargaining obligation whenever the employer unilaterally changes working conditions without bargaining. See, *e.g.*, *United States Customs Service, Washington, D.C.*, 29 F.L.R.A. No. 35 (Sept. 30, 1987); *United States Department of Health and Human Services, Social Security Administration*, 26 F.L.R.A. (No. 102) 865 (Apr. 30, 1987). In fact, the Senate Committee Report specifically references the existence of the duty to bargain in unilateral change situations: "Where agency management proposes to change established personnel policies, the exclusive representative must be given notice of the proposed changes and an opportunity to negotiate over such proposals to the extent they are negotiable."[26]

It is similarly well established that if it subsequently can be shown that the employer changed working conditions but refused to bargain over matters which were properly within the bargaining obligation, the employer has committed an unfair labor practice. See, *e.g.*, *NLRB* v. *Katz*, 369 U.S. 736 (1962) (private sector); *FLRA* v. *Social Security Administration*, 753 F.2d 156 (D.C. Cir. 1985) (federal sector). As this Court stated in *NLRB* v. *Katz*, *supra*, 369 U.S. at 744, unilateral change in conditions of employment by management "plainly frustrate[s] the statutory objective of establishing working conditions through bargaining." As a consequence, the Court held "that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat

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[26] S. Rep. No. 95-969, 95th Cong., 2d Sess. 104 (1978), *reprinted in Legis. Hist.* at 764. For discussion of the operation of this same principle under the Executive Order program which preceded the Statute, see page 37, *infra*.

refusal." *NLRB* v. *Katz, supra*, 369 U.S. at 743 (footnote omitted). See also *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674-675 (1981) ("A unilateral change as to a subject within [the mandatory duty to bargain] violates the statutory duty to bargain and is subject to the Board's remedial order.").

Hence, while Congress provided a procedure in Section 7117(b) of the Statute for use with respect to resolving compelling need issues (just as Congress provided a procedure in Section 7117(c) for use with respect to resolving other negotiability issues), there is no indication in the Statute or in its legislative history that Congress intended either of these procedures to foreclose resolution of defenses of nonnegotiability, including compelling need issues, in unilateral change unfair labor practice cases. Indeed, Aberdeen has not disputed that negotiability issues that are otherwise resolved under the Section 7117(c) procedure can appropriately be resolved in unilateral change unfair labor practice cases when they arise as agency defenses in the case.[27] Nothing in the legislative history indicates that Congress intended the Statute to depart from this practice in those situations where the employer's particular defense of nonnegotiability involves an assertion that an agency regulation bars bargaining, as opposed to an assertion, for example, that a government-wide regulation or management's nonnegotiable authority under Section 7106 bars bargaining.

[27] Furthermore, an agency may assert the kinds of negotiability issues otherwise resolved under both Section 7117(b) and Section 7117(c) procedures as alternative affirmative negotiability defenses in unilateral change unfair labor practice cases. *E.g., Department of the Navy, Washington, D.C. and Department of the Navy, U.S. Naval Supply Center, Oakland, California*, 25 F.L.R.A. (No. 81) 972 (Feb. 27, 1987); *Department of the Air Force, Eielson Air Force Base, Alaska*, 23 F.L.R.A. (No. 83) 605 (Oct. 16, 1986).

Moreover, the Authority's regulations specifically give effect to this principle. The Authority, at its inception (see 45 Fed. Reg. 3484 (1980)), promulgated rules which address how negotiability issues can be resolved when they arise in unilateral change unfair labor practice cases. The Authority adopted procedures which recognize a union's right either: (1) to seek resolution of the entire dispute, including the negotiability issues, in the unfair labor practice forum; or (2) to seek initial and separate resolution of the negotiability issues in the negotiability appeal forum. 5 C.F.R. 2423.5 and 2424.5 (Pet. App. 6a, 10a).

In keeping with these regulations, the Authority has consistently resolved as part of the unilateral change unfair labor practice case any compelling need issues necessary for disposition of the case. Apart from the Fourth Circuit's decisions in this case (Pet. App. 16a) and in *Fort Belvoir* (Pet. App. 52a-69a), of the 85 Authority decisions (see page 26, supra) that counsel for the Authority have identified as addressing an employer agency's contention that an agency regulation should be found to have a compelling need so as to bar bargaining, 12 decisions resolved the compelling need issue as part of an unfair labor practice case.[28] In none of these 12 cases has the employer

[28] See *U.S. Department of the Treasury*, 27 F.L.R.A. (No. 102) 919 (June 29, 1987); *Department of Transportation*, 26 F.L.R.A. (No. 32) 256 (Mar. 17, 1987); *United States Department of Defense, Department of the Army, McAlester Army Ammunition Plant*, 26 F.L.R.A. (No. 20) 177 (Mar. 13, 1987); *Department of the Navy, Washington, D.C. and Department of the Navy, U.S. Naval Supply Center, Oakland, California*, 25 F.L.R.A. (No. 81) 972 (Feb. 27, 1987); *Department of the Interior, Washington, D.C. and Bureau of Reclamation, Washington, D.C. and Bureau of Reclamation, Mid-Pacific Region*, 25 F.L.R.A. (No. 6) 91 (Jan. 9, 1987); *Department of the Army, Fort Greely, Alaska and Department of the*

agency sought judicial review with regard to the propriety of the Authority's having resolved the compelling need issue as part of the unfair labor practice case. And in none of these cases has the employer agency sought judicial review with regard to the merits

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Army, 172d Infantry Brigade (Alaska), Fort Richardson, Alaska and Department of the Army, Headquarters, U.S. Army Forces Command, Fort McPherson, Georgia and Department of the Army, The Pentagon, Washington, D.C., 23 F.L.R.A. (No. 105) 858 (Oct. 31, 1986); *Department of the Air Force, Eielson Air Force Base, Alaska*, 23 F.L.R.A. (No. 83) 605 (Oct. 16, 1986); *Department of Health and Human Services, Office of the Secretary, Headquarters*, 20 F.L.R.A. 175 (1985); *Department of Health and Human Services, Washington, D.C. and Department of Health and Human Services, Region 7, Kansas City, Missouri*, 16 F.L.R.A. 288 (1984); *Boston District Recruiting Command, Boston, Massachusetts and Commander, Fort Devens, Fort Devens, Massachusetts and 94th U.S. Army Reserve Command, Hanscom Air Force Base, Massachusetts and Department of the Army, Washington, D.C. and Department of Defense, Washington, D.C.*, 15 F.L.R.A. 720 (1984); *Harry Diamond Laboratories and Department of the Army and Department of Defense*, 15 F.L.R.A. 216 (1984); and *United States Marshals Service*, 12 F.L.R.A. 650 (1983).

See also *Department of the Air Force, Lowry Air Force Base, Denver, Colorado*, 22 F.L.R.A. (No. 47) 464 (July 9, 1986) (while not necessary to the Authority's holding, the Authority reaffirmed the principle that compelling need determinations may appropriately be decided in an unfair labor practice proceeding); *Federal Deposit Insurance Corporation, Headquarters*, 18 F.L.R.A. 768 (1985) (same).

Two of the 85 decisions resolved compelling need issues in the context of Authority decisions on exceptions to arbitral awards, rendered pursuant to Section 7122(a) of the Statute. 5 U.S.C. 7122(a). *Lexington-Blue Grass Army Depot, Lexington, Kentucky and AFGE, Local 894*, 24 F.L.R.A. (No. 6) 50 (Nov. 17, 1986); and *Department of the Air Force, Flight Test Center, Edwards Air Force Base, California and Interdepartmental Local 3854, AFGE*, 21 F.L.R.A. (No. 61) 445, 453-454 (Apr. 24, 1986). In each case the Authority resolved the employer agency's assertion that the arbitral award was inconsistent with an agency regulation for which there was a compelling need.

of the Authority's resolution of the particular compelling need issue (which in each case was resolved against the agency's position).

The decision of the court in *Fort Belvoir,* stating principally that the language of Section 7117(a)(2) establishes a "condition precedent" (Pet. App. 60a), overlooks the principle that, regardless of the nature of an agency's negotiability defense, an agency breaches the "continuing obligation" to bargain whenever it unilaterally changes conditions of employment and, in so doing, refuses to bargain over a matter that subsequently can be shown to have been within the duty to bargain. However, examination of the legislative history reveals not one comment in a congressional report nor one comment from a member of Congress which supports the court's conclusion. If Congress intended such a marked departure from basic precepts of labor law, there should be some indication from Congress that such a departure is intended. See *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA, supra*, 464 U.S. at 103-104, 107 (1983). Given the absence of any legislative history supporting the court's view of the Statute, the conclusion of the court below finding impermissible the Authority's construction of the Statute is, we submit, simply wrong. See *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-845 (1984); *Defense Logistics Agency* v. *FLRA, supra*, 754 F.2d at 1013-1014.[29]

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[29] The Authority's construction of the Statute gives effect to Congress' intent to continue the settled law with regard to the application of the duty to bargain over negotiable matters when the agency seeks to change working conditions. Thus, the Authority's construction of the Statute should be upheld as an expression of this intent. See *Chevron* v. *Natural Resources Defense Council, supra*, 467 U.S. at 842-843.

The court in *Fort Belvoir* also erred when it stated that the processing of a compelling need issue in a unilateral change unfair labor practice case would improperly disregard the several features of the Section 7117(b) procedure which are different from an unfair labor practice proceeding. As the court noted in *Fort Belvoir* (Pet. App. 67a-68a), the Section 7117(b) procedure presents disputes directly to the Authority, the FLRA General Counsel is not a party, and a hearing is discretionary (but if a hearing is held the agency is a necessary party). However, the court overlooked the fact that the various features in Section 7117(b) which are not present in unfair labor practice proceedings, are, with one exception, also features of the Section 7117(c) procedure for resolving all other kinds of allegations of nonnegotiability.[30] And neither Aberdeen nor the decision of the court below suggests that the Authority

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As this Court has stated, the Authority is entitled to "considerable deference when it exercises its 'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, *supra*, 464 U.S. at 97 (citation omitted). Moreover, the consistency of the Authority's decisional precedent in this area (see note 28, *supra*) is a further reason why the Court should be particularly reluctant to hold that the Authority's interpretation of the Statute is impermissible. See *Pattern Makers' League of North America* v. *NLRB*, 473 U.S. 95, 115 (1985).

[30] The Section 7117(c) procedure is expedited (7117(c)(6)) and disputes under it are presented directly to the Authority; the FLRA General Counsel is not a party (7117(c)(5)); and a hearing is discretionary (7117(c)(5)). The Authority processes both Section 7117(b) compelling need negotiability disputes and Section 7117(c) negotiability disputes under the same procedures set out at 5 C.F.R. 2424.1—2424.10 (Pet. App. 7a-14a). For a discussion of these procedures, see *AFGE* v. *FLRA*, 778 F.2d 850, 852-853 (D.C. Cir. 1985).

contravenes its Statute when it resolves the negotiability issues that would otherwise be processed under the Section 7117(c) procedure when they are raised as defenses in unilateral change unfair labor practice cases.[31]

The only difference between the Section 7117(b) procedure and the Section 7117(c) procedure is that under the Section 7117(b) procedure, in the event the Authority exercises its discretion and holds a hearing, the agency is a necessary party, whereas there is no mention of the agency being a necessary party to any hearing held under the Section 7117(c) procedure. *Defense Logistics Agency* v. *FLRA*, *supra*, 754 F.2d at 1011 n.13. The agency's participation in a Section 7117(b) hearing may have its antecedents in the Executive Order. There, agencies were specifically encouraged to waive the assertions by local management that agency regulations barred bargaining (see 1975 Council Report at 39-40, *reprinted in Legis. Hist.* at 1309-1310 (App. 7a-8a, *infra*)). Further, in order to ensure that an agency head had been given notice and an opportunity to waive such an assertion of nonnegotiability, the Council only accepted a compelling need negotiability appeal for processing if the union had specifically asked the agency head for an exception to that particular bar to bargaining and the agency head either did not respond or refused to grant the exception (5 C.F.R. 2411.22(b) (1978)). Under the Statute, the requirement that an agency head be a party to any discretionary hearing under Section 7117(b) would similarly ensure that the agency head has an opportunity to waive the regulation as a bar to bargaining (see Section 7117(b)(2)(A)).

[31] The Authority resolves whether an agency regulation is a bar to bargaining in an unfair labor practice case when management, in the context of a management-initiated change in conditions of employment, raises such a regulation as an affirmative defense to an alleged breach of the bargaining obligation. For example, management may assert either that the change was required by a newly-issued regulation for which there is a compelling need (*e.g.*, *Department of the Interior, Washington, D.C. and Bureau of Reclamation, Washington, D.C. and Bureau of Reclamation, Mid-Pacific Region*, 25 F.L.R.A. (No. 6) 91 (Jan. 9, 1987)), or

Finally, regardless whether the Section 7117(b) procedure or the unfair labor practice procedure is used to determine the merits of an assertion of a compelling need for an agency regulation, the outcome of that determination would be the same. In either forum, the merits are decided by the Authority; the agency's burden of proof in demonstrating a compelling need for the regulation is the same;[32] access to judicial review is the same; and if a compelling need were found, the agency would be under no obligation to bargain over proposals which conflict with the regulation.

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management may assert that, whatever the reason for the change, an agency regulation for which there is a compelling need precluded bargaining over certain union proposals which the union offered in response to the change (*e.g., Department of Health and Human Services, Washington, D.C. and Department of Health and Human Services, Region 7, Kansas City, Missouri*, 16 F.L.R.A. 288 (1984); *United States Marshals Service*, 12 F.L.R.A. 650 (1983)). In either event, the Authority is simply resolving the employer agency's defense to the alleged unfair labor practice, just as the Authority would resolve such a defense if it involved a negotiability issue otherwise resolved under Section 7117(c) of the Statute (*i.e.*, that, when management changed conditions of employment, a government-wide regulation was a bar to bargaining because the union sought to bargain over matters which would bring about an inconsistency with the regulation). Moreover, it should be noted that under the Authority's practice, and contrary to the court's statement in *Fort Belvoir* (Pet. App. 62a), the Section 7117(b) procedure has not been "regulated out of existence." See discussion at page 31, *supra*, noting that only 12 of the 85 decisions identified as resolving compelling need disputes were unfair labor practice decisions.

[32] See, *e.g., Department of Health and Human Services, Office of the Secretary, Headquarters*, 20 F.L.R.A. 175 (1985) (unfair labor practice case); *AFGE, Local 2875 and Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southeast Fisheries Center, Miami Laboratory, Florida*, 5 F.L.R.A. 441, 446 (1981) (negotiability case).

C. The Authority's practice of resolving whether there is a compelling need for an agency regulation, when that issue arises as an agency defense in a unilateral change unfair labor practice case, is consistent with pre-Statute practice

As acknowledged by the court in *Fort Belvoir* (Pet. App. 64a), and as found by the D.C. Circuit in *Defense Logistics Agency* v. *FLRA, supra*, 754 F.2d at 1008, the Authority's construction of the Statute, in allowing for the unified processing of any compelling need issues raised in a unilateral change unfair labor practice case, is consistent with established Executive Order practice which predated the Statute.

Under the Executive Order program, the obligation of an agency to negotiate prior to making changes in employee working conditions was discussed in the 1975 Council Report which stated that the "[Executive] Order does require adequate notice and an opportunity to negotiate prior to changing established personnel policies and practices and matters affecting working conditions during the term of an existing agreement unless the issues thus raised are controlled by current contractual commitments, or a clear and unmistakable waiver is present." 1975 Council Report at 41, *reprinted in Legis. Hist.* at 1312 (App. 12a, *infra*). In the same 1975 Council Report, a unified procedure was proposed for processing alleged breaches of this bargaining obligation. 1975 Council Report at 46-48, *reprinted in Legis. Hist.* at 1323-1327 (App. 14a-18a, *infra*).

The 1975 Council Report specifically proposed that the Department of Labor's Assistant Secretary of Labor for Labor-Management Relations (the office charged with initially resolving federal sector unfair labor practice complaints under the Executive Order) be authorized to decide any negotiability issues

necessary to the resolution of such cases even though there may not be existing precedent from the Federal Labor Relations Council (the body which heard, among other things, negotiability appeals) to guide the Assistant Secretary.[33] In this connection, the Report stated that giving this additional authority to the Assistant Secretary would avoid "[u]nnecessary additional steps in the adjudicatory process [which] would be required if such negotiability issues were brought to the Council for initial adjudication." 1975 Council Report at 47, *reprinted in Legis. Hist.* at 1325 (App. 17a, *infra*). Moreover, the 1975 Council Report specifically rejected "the alternative of requiring the Assistant Secretary to forward negotiability issues to the Council for determination when they appeared in the course of an unfair labor practice proceeding thus deferring his decision in the interim until the Council could resolve the issues concerned." 1975 Council Report at 48, *reprinted in Legis. Hist.* at 1326 (App. 17a, *infra*).[34] As the result of this Council Report, the unified approach to

[33] As stated in the 1975 Council Report at 47, *reprinted in Legis. Hist.* at 1324 (App. 16a, *infra*):

> The amendments which we propose would affirm the authority of the Assistant Secretary, in the context of certain unfair labor practice cases, to resolve negotiability issues, *even though there is no existing Council precedent to guide him*, so long as these issues do not arise in connection with negotiations between the parties but rather as a result of a respondent's alleged refusal to negotiate by unilaterally changing an established personnel policy or practice, or matter affecting working conditions. [Emphasis added.]

[34] In rejecting this alternative, the 1975 Council Report at 48, *reprinted in Legis. Hist.* at 1326-1327 (App. 17a-18a, *infra*) stated:

> Where negotiability issues arise in the context of such unfair labor practice proceedings they are often inextricably intertwined with disputed issues of fact which must be resolved in order to arrive at a conclusion concerning the motivation of the parties. Such disputed issues of fact are best resolved through the adversary process of a formal hearing. For this reason, and because of the delays attendant in such a referral procedure, the Council does not believe that such an alternative is feasible or appropriate.

resolving negotiability issues as part of the unilateral change unfair labor practice case in which they arose was incorporated into the Executive Order program in section 11(d) of Executive Order 11491.[35]

At the same time that the 1975 Council Report introduced the unified approach to resolving negotiability issues as part of the unilateral change unfair labor practice case in which they arose, the Report also removed agency regulations as a general bar to negotiations over inconsistent proposals. Instead, as discussed at pages 20-22, *supra*, the compelling need standard was introduced, such that only those agency regulations for which a compelling need exists (under criteria established by the Council), as opposed to all agency regulations, were to bar negotiations with respect to a conflicting proposal. 1975 Council Report at 37,

[35] Section 11(d) provided:

> (d) If, as the result of an alleged unilateral change in, or addition to, personnel policies and practices or matters affecting working conditions, the acting party is charged with a refusal to consult, confer or negotiate as required under this order, the Assistant Secretary may, in the exercise of his authority under section 6(a)(4) of the order, make those determinations of negotiability as may be necessary to resolve the merits of the alleged unfair labor practice. In such cases the party subject to an adverse ruling may appeal the Assistant Secretary's negotiability determination to the Council.

Executive Order 11838 (1975), 3 C.F.R. 957, 959 (1971-75 comp.), *reprinted in Legis. Hist.* at 1336, 1339.

reprinted in Legis. Hist. at 1304 (App. 1a, *infra*).[36] Moreover, the 1975 Council Report also introduced a direct appeal procedure for determining whether an agency's regulation was nonnegotiable under the compelling need criteria. See note 9, *supra*.

Thus, ever since the time that the Executive Order first provided that agency regulations for which no compelling need exists did not preclude collective bargaining, resolution of such a compelling need issue could be processed either: (1) in a direct negotiability appeal procedure to the Federal Labor Relations Council; or (2) in the case of a dispute over an agency's alleged breach of the bargaining obligation (when management changes conditions of employment and where management defends against the alleged breach by asserting bargaining was barred by an agency regulation for which a compelling need existed), in an unfair labor practice procedure before the Department of Labor's Assistant Secretary of Labor for Labor-Management Relations. Accordingly, when Congress established in the Statute a negotiability appeal procedure for compelling need issues, Congress simply continued that procedure from Executive Order practice, the same Executive Order practice which also allowed for the processing of compelling need issues in unilateral change unfair labor practice cases.

Viewed in this context, and contrary to the conclusion of the court in *Fort Belvoir* (Pet. App. 64a), Congress' continuation in Section 7117(b) of the Statute of a separate negotiability appeal procedure for compelling need issues is not a rejection of the pre-Statute practice of unified processing of compelling need issues in

[36] This change was incorporated into Executive Order 11491, as amended, by Executive Order 11838 (1975), 3 C.F.R. 957, 960 (1971-75 comp.), *reprinted in Legis. Hist.* at 1336, 1339.

unilateral change unfair labor practice cases. It no more indicates a rejection of pre-Statute practice than does Congress' continuation in Section 7117(c) of the Statute of a separate negotiability appeal procedure for resolving other negotiability issues. And as noted, neither Aberdeen nor the court's decision in *Fort Belvoir* suggests that the Authority contravenes its Statute when it resolves the negotiability issues (that would otherwise be processed under the Section 7117(c) procedure) when they are raised as defenses in unilateral change unfair labor practice cases.

The court in *Fort Belvoir* also erred in viewing Executive Order 12107 (Dec. 28, 1978), 3 C.F.R. 264 (1979), as buttressing its conclusion that Congress rejected the Executive Order practice of allowing compelling need issues to be resolved in unilateral change unfair labor practice cases (Pet. App. 66a). Executive Order 12107 was issued to govern the federal labor-management relations program for the 10-day period between January 1, 1979 (the date the Federal Labor Relations Authority came into being as a result of Reorganization Plan No. 2 of 1978)[37] and January 11, 1979 (the date the Statute took effect).[38] Executive Order 12107 was the housekeeping measure which reassigned Executive Order tasks from the expiring Federal Labor Relations Council and from the Assistant Secretary of Labor for Labor-Management Relations to the newly created and single entity, the Federal Labor Relations Authority.[39]

While Executive Order 12107 did not specify that negotiability issues could be decided as part of

[37] H.R. Doc. No. 95-341, 95th Cong., 2d Sess. (1978), *reprinted in Legis. Hist.* at 630.

[38] Pub. L. No. 95-454, § 907; 92 Stat. 1227 (1978).

[39] H.R. Rep. No. 95-1396, 95th Cong., 2d Sess. 5 (1978), *reprinted in Legis. Hist.* at 663.

unilateral change unfair labor practice cases (as Executive Order 11491, as amended, did in section 6(a) and section 11(d)), there was no longer a need for the Executive Order to do so. Formerly, and as discussed at pages 37-39, *supra*, under Executive Order 11491 the Assistant Secretary's jurisdiction to resolve negotiability issues in unilateral change unfair labor practice cases was an exception to the Council's initial jurisdiction over all negotiability disputes. See 1975 Council Report at 46-48, *reprinted in Legis. Hist.* at 1324-1327 (App. 14a-18a, *infra*). Therefore, that jurisdiction needed to be spelled out. However, with the advent of Reorganization Plan No. 2, which gave the Authority initial jurisdiction over both negotiability and unfair labor practice disputes, there was no longer any need to specify such separate jurisdictional authority.

Consequently, the Authority's interpretation of the Statute at issue in this case is consistent with pre-Statute practice. Moreover, Section 7135(b) of the Statute specifically recognizes the relevance and the importance of consistency with pre-Statute practice when it specifies, "[p]olicies, regulations, and procedures" under the Executive Order remain in force "until revised or revoked by the President, or unless superseded by specific provisions of [the Statute]." 5 U.S.C. 7135(b). Accordingly, consistency with this Executive Order practice is further support for affirming the Authority's construction of the Statute. See *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1426 and n.1 (D.C. Cir. 1985).

D. Considerations of public policy support the unified processing of a compelling need issue in the unfair labor practice case in which it arises

Finally, as the Authority stated in its decision (Pet. App. 25a-26a), it is in the interest of the efficient and

effective administration of the Statute that all issues which arise in an unfair labor practice dispute be resolved in that unfair labor practice proceeding. Unified processing of a compelling need issue in the unfair labor practice case in which it arises is responsive to "concern over duplicative proceedings and delay and prejudice to governmental employees."[40] The dispute resolution process is streamlined and shortened,[41] which, as the Authority noted, effectuates Congress' goal to facilitate and promote the collective bargaining process by providing for the resolution of all relevant issues in one proceeding, thereby obviating the delay inherent in two separate and consecutive proceedings. In addition, employees are afforded a forum, and access to a remedy, that can provide some form of retroactive relief in appropriate cases.

There are no drawbacks to processing a compelling need issue in the unfair labor practice case in which it arises. When the Authority concludes that an agency's refusal to bargain was justified by an agency regulation for which there is a compelling need, resolving all the issues in one forum obviously does not adversely affect the agency. Furthermore, regardless of whether the compelling need issue is processed as part of a unilateral change unfair labor practice case, agencies remain able to issue new regulations and they remain able to enforce, as a bar to collective bargaining, any regulation which Congress intended to bar collective bargaining (that is, any regulation for which the agency can demonstrate a compelling need).[42]

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[40] *Defense Logistics Agency* v. *FLRA*, *supra*, 754 F.2d at 1014 (footnote omitted).

[41] See *id.* at 1012.

[42] Moreover, in Section 7116(a)(7) of the Statute (5 U.S.C. 7116(a)(7)), Congress specified that where newly issued government-wide and agency regulations (including those for which a compelling need exists) conflict with a pre-existing term

On the other hand, in situations where the Authority finds no compelling need for the regulation at issue, the agency is not improperly affected.[43] In this case, for example, Aberdeen was only ordered to bargain prospectively and to post appropriate notices.[44] But even an order to rescind a unilateral change over which

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of a collective bargaining agreement, the collective bargaining agreement provision is paramount.

[43] See *Defense Logistics Agency* v. *FLRA*, *supra*, 754 F.2d at 1013.

[44] The Authority's decision only ordered the agency to bargain, not to agree, on the proposal; the Authority did not decide the merits of the proposal. And, "[i]n collective bargaining, government managers are presumably competent to look out for government interests." *Department of Defense* v. *FLRA*, *supra*, 659 F.2d at 1157. See also *United States Naval Ordnance Station* v. *FLRA*, 818 F.2d 545, 551 n.7 (6th Cir. 1987).

If the parties, in the course of their collective bargaining, reach an impasse, either party may request the assistance of the Federal Service Impasses Panel as provided in Section 7119 of the Statute. The Impasses Panel is comprised of seven presidential appointees, selected "solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations." 5 U.S.C. 7119(c)(2). The Impasses Panel is empowered to take whatever action is necessary to resolve an impasse, including ordering parties to agree to specific proposal language. See *Council of Prison Locals* v. *Brewer*, 735 F.2d 1497 (D.C. Cir. 1984). When issuing such an order, decisions of the Impasses Panel indicate that the reasonableness of any proposal at issue will be considered in determining what contract language will be imposed. See *Veterans Administration Medical Center, Tampa, Florida* v. *FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982). See also *Department of the Army, Toole Army Depot, Toole, Utah and Local 2185, AFGE*, Case No. 83 FSIP 62 (Jan. 6, 1984) (Impasses Panel resolved impasse over how much administrative leave should be extended to employees donating blood).

there was a duty to bargain is simply one well-accepted way in which a breach in the collective bargaining obligation is remedied.[45]

Accordingly, contrary to the conclusion of the court below, unified processing of compelling need issues in unilateral change unfair labor practice cases does not hamstring or improperly restrict the flexibility of an agency. Instead, the various policy considerations supporting the Authority's construction of the Statute prompted the D.C. Circuit to conclude that the Authority's construction is "not only a permissible reading of the Statute, but also a reasonable one, in the truest sense—namely, that the Authority had good reasons for reading the Statute in that way." *Defense Logistics Agency* v. *FLRA*, *supra*, 754 F.2d at 1014.[46]

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[45] See *Decision on Petition for Amendment of Rules*, 23 F.L.R.A. (No. 57) 405, 406-408 (Sept. 23, 1986), petition for review filed *sub nom. National Labor Relations Board Union, et al.* v. *FLRA*, No. 86-1624 (D.C. Cir. Nov. 17, 1986). See also, *e.g.*, *Department of the Army, Fort Greely, Alaska and Department of the Army, 172d Infantry Brigade (Alaska), Fort Richardson, Alaska and Department of the Army, Headquarters, U.S. Army Forces Command, Fort McPherson, Georgia and Department of the Army, The Pentagon, Washington, D.C.*, 23 F.L.R.A. (No. 105) 858, 867 (Oct. 31, 1986).

[46] While the court below did not address the merits of the Authority's resolution of the compelling need issue in this case, we note that the merits of that issue were properly resolved by the Authority. The Authority correctly concluded that Aberdeen had failed to sustain its burden of establishing, in accordance with criteria in 5 C.F.R. 2424.11, a compelling need for the regulations that were inconsistent with the union's proposals. The Authority noted (Pet. App. 27a) that Aberdeen argued that there was a compelling need for the regulations because they were essential to meet its objective in curtailing operations, which was to

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to conduct further proceedings consistent with the Court's opinion.[47]

Respectfully submitted.

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conserve energy. However, the Authority properly found that this argument failed to establish how the granting of administrative, rather than annual, leave in any way affected Aberdeen's stated objective of conserving energy (Pet. App. 27a-28a). See also *NAGE, Local R14-62 and U.S. Army Dugway Proving Ground, Dugway, Utah*, 26 F.L.R.A. (No. 7) 59 (Mar. 6, 1986) (compelling need not found under 5 C.F.R. 2424.11 because demonstration of monetary savings alone is not sufficient to establish that a regulation is essential, as distinguished from helpful or desirable).

[47] "I authorize the filing of this brief. Charles Fried, Solicitor General."

APPENDIX

EXCERPTS FROM LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE JANUARY 1975: REPORT AND RECOMMENDATIONS OF THE FEDERAL LABOR RELATIONS COUNCIL ON THE AMENDMENT OF EXECUTIVE ORDER 11491, AS AMENDED

V. SCOPE OF NEGOTIATIONS

1. The Role of Agency Regulations.

Section 11(a) should be amended to provide that only those internal agency regulations for which a "compelling need" exists—under criteria to be established by the Council—may bar negotiations with respect to a conflicting proposal. Section 11(c) should also be amended to authorize the Council to resolve disputes concerning an agency head's determination, in connection with negotiations, that an agency's regulations meet the "compelling need" standard.

Section 11(a) should be amended to provide that, as to those internal agency regulations for which a "compelling need" exists, only those issued at the agency headquarters level or at the level of a primary national subdivision may bar negotiations. Section 11(c) should also be amended to authorize the Council to resolve disputes concerning an agency head's determination, in connection with negotiations, as to the level of issuance of the regulations involved.

The Council, by rule, should consider an appeal from a labor organization challenging an agency head's determination that an internal agency regulation bars negotiation only if the labor organization has first requested an exception to the regulation from the agency head and that request has been denied.

The Council, by rule, should consider an appeal from a labor organization challenging an agency head's determination that an internal agency regulation bars negotiation only if such appeal is filed by the national president of a labor organization (or his designee) or the president of a labor organization not affiliated with a national organization (or his designee).

These amendments to the Order concerning internal agency regulations which may bar negotiations should become effective 90 days after issuance by the Council of the criteria for determining "compelling need" and should apply alike to those regulations existing on, or adopted after, the effective date of these amendments.

Section 11(a) of the present Order provides in relevant part that the scope of negotiations on personnel policies and practices and matters affecting working conditions is limited by applicable regulations issued at higher levels within the agency.

The appropriate interface between internal agency regulations and conflicting bargaining proposals, as reflected in the provisions of section 11(a), has been a matter of continuing concern under the Federal labor-management relations program since its inception. In this regard, the 1969 Study Committee Report which accompanied the present Order emphasized that agency regulatory authority must be retained. However, the Study Committee sought to minimize the preemption by internal agency regulations of matters otherwise negotiable under the Order by urging agencies to avoid the issuance of overprescriptive regulations; to increase delegations of authority over personnel policies to local managers so as to permit a wider scope for negotiation; and to grant exceptions from higher level regulations on specific items where jointly requested and feasible.

Experience under the Order, as well as testimony during the current review, establishes that, while considerable progress toward a wider scope of negotiation at the local level has been effected, the exhortations by the Study Committee (which were supplemented by information activities under the Order by the Council and its constituent members) have fallen short of their objectives. As a result, meaningful negotiations at the local level on personnel policies and practices and matters affecting working conditions have been unnecessarily constricted in a significant number of instances by higher level agency regulations not critical to effective agency management or the public interest. Likewise, the parties have not fully explored the opportunities for exceptions from agency regulations asserted as bars to negotiations.

The Council remains firm in its belief that agency regulatory authority must be retained. Nevertheless, modifications in the present role of internal agency regulations as a bar to negotiations should be adopted, consistent with essential agency requirements, to implement the purposes of an evolving and dynamic Federal labor-management relations program. (Such modifications would complement the Council's recommendations with respect to the consolidation of bargaining units which, it is believed, would likewise result in a broader scope of negotiations.) To these ends, changes in the Order and the Council's practices thereunder are recommended as set forth below.

(a) *Agency regulations for which a "compelling need" exists.*

Under section 11(a) of the present Order, a higher level agency regulation bars negotiation on any conflicting bargaining proposal regardless of the degree of necessity for the regulation. To the extent that such

regulations are asserted as a bar to negotiations, the goal of providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment is not fully achieved.

Some labor organizations and agencies suggested the concept of permitting internal agency regulations at a higher level, covering personnel policies and practices and matters affecting working conditions, to bar negotiations at the local level only if a "compelling need" for such regulations exists. Regulations, the need for which is not compelling, would not be available as a bar to negotiations although they would retain their full force and effect in all other respects. The Council finds merit in this suggestion and recommends that it be adopted.

Illustrative criteria for determining "compelling need" would be established in rules to be published by the Council after the views of interested persons have been fully considered in the rule-issuing process. A similar process was employed by the Council in the adoption of rules terminating formal recognition and establishing criteria for granting national consultation rights under Executive Order 11491. Such participation by interested persons in the process will facilitate the development and understanding of effective criteria which will take into account the particular needs of agencies and labor organizations and enable the Council to strike a proper balance between negotiations and the exercise of agency regulatory authority.

Further, disputes as to whether an agency regulation, as interpreted by the agency head, meets the standard of "compelling need" should be resolved by the Council on a case-by-case basis in negotiability appeals filed under section 11(c) of the Order. (A decision by the Council as to the "compelling need" for a regulation

in one agency or one primary national subdivision of an agency would not, of course, be dispositive as to the "compelling need" for the same or similar regulation in another agency or another primary national subdivision in the same agency.)

Section 11 of the Order and the Council's rules should be amended to reflect these changes.

It must be emphasized in connection with the foregoing recommendations, that we are here concerned only with the question of whether a higher level internal agency regulation covering personnel policies and practices or matters affecting working conditions should serve as a bar to *negotiations* on a conflicting proposal submitted at the local level.

As previously indicated, even a regulation which does not satisfy the "compelling need" standard would remain completely operative as a viable agency regulation in full force and effect throughout the agency or the primary national subdivision involved, including those organizational elements wherein exclusive bargaining units exist. The effect of a determination that the regulation does not meet the "compelling need" standard would simply mean that the regulation would not serve to bar negotiation on a conflicting proposal. Such a regulation, if otherwise valid, would thus continue to apply in a given exclusive bargaining unit except to the extent that the local agreement contains different provisions. Moreover, while a higher level agency regulation for which no "compelling need" exists would not serve to bar negotiation on a conflicting proposal, that proposal would remain subject to the additional negotiability limitations in sections 11(a), 11(b), and 12(b) of the Order, which limitations, as discussed under V.2. below, would continue unchanged. Finally, these recommendations would have no effect on section 11(c)(3) of the Order which now

provides that an agency head's determination as to the interpretation of an agency's regulations with respect to a proposal is final.

(b) *Level of issuance.*

Under the present Order, negotiation at the local level is limited by any internal agency regulations issued above the local level. In some instances, this results in local negotiations being limited by a superstructure of regulations issued by agency headquarters and by each subdivision of the agency to which authority has been delegated, above the local level. These multiple levels of regulations have unduly constricted negotiations by reason of the complexity of issuances as well as by the diverse exercise of authority and discretion with regard to the issuance and implementation of regulations dealing with otherwise negotiable matters within subordinate levels of the same agency.

We do not question the statutory authority of agency heads to delegate regulation-issuing authority within their agencies. Moreover, as already mentioned, we believe that agency regulatory authority must be retained. However, we recommend that only those regulations issued at the agency headquarters level or at the level of a primary national subdivision serve to bar negotiations at the local level. By thus delineating the levels of internal agency regulations which may bar negotiation, the confusion and anomalies previously encountered can be effectively eliminated without unreasonably circumscribing the respective agencies.

It should be understood in connection with the foregoing recommendation that we are here concerned only with the question of whether a higher level internal agency regulation issued below the headquarters level or the level of a primary national subdivision, and covering personnel policies and practices and matters

affecting working conditions, should serve as a bar to *negotiations* on a conflicting proposal submitted at the local level. Such regulations would remain completely operative as viable agency regulations, if otherwise valid, and would continue to apply in a given exclusive bargaining unit except to the extent that the local agreement contains different provisions. Moreover, while a higher level internal agency regulation issued below the headquarters level or the level of a primary national subdivision would not serve to bar negotiation on a conflicting proposal, that proposal would remain subject to the additional negotiability limitation in sections 11(a), 11(b), and 12(b) of the Order, which limitations, as discussed under V.2. below, would continue unchanged.

Disputes as to the level of issuance of an internal agency regulation asserted as a bar to negotiation should be resolved by the Council in negotiability appeals filed under section 11(c) of the Order.

Finally, in determining whether regulations are issued at the level of a "primary national subdivision," the meaning of that phrase should be consistent with that provided in Part 2412 of the Council's Rules and Regulations pertaining to National Consultation Rights and Termination of Formal Recognition: "Primary national subdivision of an agency means a first-level organizational segment which has functions national in scope that are implemented in field activities."

Section 11 of the Order, and the Council's rules, should be amended to reflect these changes.

(c) *Requests for exceptions to agency regulations.*

The 1969 Study Committee, as previously indicated, encouraged agencies to grant exceptions to higher level agency regulations where jointly requested and feasible. Further, the Council publicly noted, under the

present Order, that parties have not taken full advantage of the opportunity to seek exceptions to agency policies and regulations; and that some negotiability disputes involving the validity of agency regulations have been brought to the Council without an attempt first to seek exceptions to the agency regulations.

The Council is of the opinion that the failure of the parties to explore the opportunity of an exception to a higher level agency regulation determined by the agency head to bar negotiations, before recourse to the Council, reflects a disservice to the purposes of the Federal labor-management relations program.

Accordingly, if the foregoing amendments to the Order are adopted, the Council intends to revise its rules to provide that the Council will not consider a negotiability appeal by a labor organization challenging an internal agency regulation determined to bar negotiation unless the labor organization first requests (unilaterally or jointly) an exception to the regulation from the agency head and such exception is denied or not acted upon within time limits to be established by the Council.

(d) *Filing of appeals challenging agency regulations as bars to negotiations.*

The Council believes that if an agency head determines that a proposal is nonnegotiable by reason of a higher level agency regulation, and the labor organization disputes the "compelling need" for such regulation or its level of issuance, such dispute should be subject to the same right of appeal to the Council by the labor organization immediately concerned, as now provided with respect to analogous disputes under section 11(c) of the Order.

However, the Council is aware that an unnecessary multiplication of challenges could derive from the

recommended changes in the Order which would unreasonably burden and impede the effective operation of the program. To minimize this possibility, the Council, if its recommendations are adopted, intends to adopt a rule providing that negotiability appeals challenging the "compelling need" for or level of issuance of higher level agency regulations determined to bar negotiation may be filed only by the national president of a labor organization (or his designee) or the president of a labor organization not affiliated with a national organization (or his designee). Such a provision would be consistent with the limitations now provided in Part 2410 of the Council's rules concerning requests for interpretation of the Order or a statement on a major policy issue.

(e) *Effective date of amendments; impact on existing regulations.*

The Council has fully considered the issues of whether the recommended changes in the Order with respect to higher level agency regulations should be deferred beyond the effective date of other amendments to the Order, i.e., 90 days after the effective date of the Order; and whether the presently recommended changes should apply to current agency regulations or be limited or deferred in their application to such regulations.

As to the effective date of the recommended changes regarding higher level agency regulations which may bar negotiations, the Council is of the view that an orderly transition will best be accomplished by deferring the application of such changes to 90 days after regulations establishing illustrative criteria for determining "compelling need" have been issued by the Council.

As to the impact of such changes on existing regulations, the Council is of the opinion that the purposes

of the Federal labor-management relations program would best be served if the changes here proposed apply alike to those higher level agency regulations existing on, or adopted after, the effective date of these recommended changes in the Order.

2. *Retention of Sections 11(b) and 12(b).*

Section 11(b) and 12(b) should be retained without change.

A prevailing objective of the general review was to assess ways in which the scope of negotiations could be expanded to enable the negotiating process to function in a more productive fashion. As indicated in the preceding sections of this Report, the Council is making significant recommendations to facilitate the consolidation of units and to modify section 11(a). These proposals are expected to result in a broader scope of negotiations. There remains for discussion the question, raised in the general review, as to whether sections 11(b) and 12(b) of the Order should be revised or clarified.

The program review produced many recommendations from interested parties regarding the substance and form of these sections. Recommendations ranged from proposals to eliminate specific matters on which agencies possess discretion to negotiate under section 11(b), to proposals for deleting the management rights provisions altogether. The Council has carefully examined all recommendations and has reviewed its decisions and issuances which interpret sections 11(b) and 12(b). We have decided that the substantive limits on negotiation, as currently expressed in these sections, should remain unchanged.

It was the view of the 1961 President's Task Force on Employee-Management Relations in the Federal Service that the uniform retention and protection of

certain basic management rights was of sufficient importance to the Government and to the public interest that these rights should be embodied in the Order and not left to determination through the process of negotiations. The management rights provisions originally framed in the Task Force Report and in Executive Order 10988 remain essentially unchanged in the present Order. The Council continues to believe it is essential to the public interest to preserve basic management rights in the Order itself.

Included in the Council's concern is the need for careful, consistent delineation of the distinction between the areas of management rights and of negotiations. A significant number of negotiability questions recently brought to the Council have resulted in the issuance of case decisions which have been studied and applied throughout the Government. The Council believes that further delineation of the boundary between management rights and negotiation will be better handled through the continuation of this evolutionary process of case decisions than through an attempt to codify decisions and redraft these provisions.

For these reasons the Council recommends no change in sections 11(b) and 12(b).

3. *The Obligation to Negotiate.*

Section 11(a) comprehends an obligation to "negotiate" with respect to midcontract changes in established personnel policies and practices and matters affecting working conditions. "Consultation" is required only with respect to those labor organizations accorded "national consultation rights" under section 9. The term "meet and confer," as used in the Order, is intended to be construed as a synonym for "negotiate."

Section 11 (a) of the Order requires that the parties "shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions . . . ." The term "reasonable times" is not further defined in the Order. It is evident that at the very least the duty thus described requires that the parties avoid unnecessary delays in the process of negotiation. However, the question is raised as to whether the Order requires, in addition, that a party must meet its obligation to negotiate prior to making changes in established personnel policies and practices and matters affecting working conditions during the term of an agreement.

The Assistant Secretary, when faced with this issue in a case, concluded that the Order does require adequate notice and an opportunity to negotiate prior to changing established personnel policies and practices and matters affecting working conditions during the term of an existing agreement unless the issues thus raised are controlled by current contractual commitments, or a clear and unmistakable waiver is present. We believe that the Assistant Secretary's conclusion on this matter is correct and, therefore, no change in the Order is warranted in this regard.

Certain agency spokesmen have suggested that such a requirement could unreasonably delay agency management in instituting necessary changes during the term of the agreement, and thus restrict management's flexibility in the conduct of the Government's business. The Order is predicated on an assumption that "the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment . . . ." We have found no reason during the

course of the current review to doubt the wisdom of this assumption, nor have we found any basis to conclude that employee participation in these matters is any less critical to their well-being, or the efficient administration of Government during the term of an agreement, than it is during the relatively brief period of formal contract negotiations. On the contrary, the fact that changes in established personnel policies and practices and matters affecting working conditions during the term of an agreement are often the result of changes in circumstances which were not foreseen by either party during the period of contract negotiations makes it appear likely that employee participation at such junctures may be even more important than during the regular negotiation period. It should be noted, however, that such participation must necessarily be "subject to law and the paramount requirements of public service . . .", particularly in regard to possible delays which would in effect negate the exercise of those rights expressed in sections 11(b) and 12(b) of the Order.

Finally, we believe that the confusion which has developed over the apparent interchangeable use of the terms "consult," "meet and confer," and "negotiate" with respect to relationships between agencies and labor organizations in the Order should be eliminated. The parties to exclusive recognition have an obligation to "negotiate" rather than to "consult" on negotiable issues unless they mutually have agreed to limit this obligation in any way. In the Federal labor-management relations program, "consultation" is required only as it pertains to the duty owed by agencies to labor organizations which have been accorded national consultation rights under section 9 of the Order. The term "meet and confer," as used in the Order, is intended to be construed as a synonym for "negotiate."

* * * * *

VIII. OPERATION OF THIRD-PARTY PROCEDURES

1. *Negotiability Disputes in Unfair Labor Practice Proceedings.*

Sections 6(a) and 11 should be amended to assign to the Assistant Secretary express authority to resolve those negotiability issues which have arisen not in connection with negotiations, but rather in the context of unfair labor practice proceedings resulting from unilateral changes in established personnel policies and practices and matters affecting working conditions. In addition, sections 4 (c) and 11 should be amended to permit a party adversely affected by such a determination to exercise a right to have the negotiability determination reviewed on appeal by the Council.

Executive Order 11491 established special procedures to resolve disputes over negotiability questions. Section 4(c)(2) gives the Council authority to consider "appeals on negotiability issues as provided in section 11(c) of [the] Order;" which section stipulates that "[i]f, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows: . . . (4) A labor organization may appeal to the Council for a decision when—(i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or (ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order."

Thus, if in connection with negotiations, a dispute arises over the negotiability of a proposal and that

dispute meets the conditions prescribed in section 11(c) of the Order, it shall be resolved by the Council. The Study Committee Report and Recommendations of August 1969 which led to the issuance of Executive Order 11491 stated that a "labor organization should be permitted to file an unfair labor practice complaint when it believes that a management official has been arbitrary or in error in excluding a matter from negotiation which has already been determined to be negotiable through the processes described . . . [in section 11(c) of the Order]."

Section 6(a)(4) of the Order, as currently formulated, gives the Assistant Secretary authority to "decide unfair labor practice complaints," including complaints under sections 19(a)(6) or 19(b)(6) that a party has "refused to . . . negotiate. . . ." The Assistant Secretary has consistently ruled that a party may not utilize the unfair labor practice provisions set forth in section 19(a) of the Order as a means for resolving negotiability disputes which arise in connection with negotiations.[4] Consistent with the Study Committee Report, the Assistant Secretary has held that section 19 provides a party in such circumstances the opportunity to file an unfair labor practice complaint alleging a refusal to negotiate only where the matter excluded from negotiation has already been determined to be negotiable through the procedures set forth in section 11(c) of the Order. In other words, the Assistant Secretary has declined to consider "refusal-to-negotiate" unfair labor practice complaints arising in

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[4] *U.S. Department of Defense, Department of the Army, Army Materiel Command, Automated Logistics Management Systems Agency*, A/SLMR No. 211 (October 30, 1972); *Army and Air Force Exchange Service, Keesler Consolidated Exchange*, A/SLMR No. 144 (March 28, 1972); Report on a Decision of the Assistant Secretary, Report No. 26 (March 18, 1971).

connection with negotiations and posing negotiability issues *unless* there exists applicable Council precedent on which he can rely to resolve the negotiability issues.

We support the Assistant Secretary's position on this matter. Thus, the changes which we here propose would not affect the existing authority of the Council to resolve, under the section 11(c) procedures, negotiability disputes which arise in connection with negotiations nor would these changes affect the existing responsibility of the Assistant Secretary to rely upon Council precedent to resolve negotiability issues that arise in unfair labor practice cases.

The amendments which we propose would affirm the authority of the Assistant Secretary, in the context of certain unfair labor practice cases, to resolve negotiability issues, even though there is no existing Council precedent to guide him, so long as these issues do not arise in connection with negotiations between the parties but rather as a result of a respondent's alleged refusal to negotiate by unilaterally changing an established personnel policy or practice, or matter affecting working conditions.

The principal argument set forth during the review by those opposed to the Assistant Secretary's exercise of such authority was that it would result in a bifurcation in the jurisdiction to make negotiability determinations (with the Council retaining the authority to determine negotiability questions raised in connection with negotiations); it was contended that this would lead to conflicting lines of precedential case authority. Furthermore, it was argued that in the absence of an aggrieved party's ability to have such determinations reviewed by the Council as a matter of right, these conflicts would tend to persist.

While this argument is not without merit, we are of the opinion that the purposes of the Order would be

better served, on balance, by permitting the Assistant Secretary to exercise the authority to hear and rule on negotiability questions which arise in the context of an unfair labor practice proceeding, resulting from a unilateral change in established personnel policies and practices and matters affecting working conditions rather than requiring such cases to come first to the Council.

Unnecessary additional steps in the adjudicatory process would be required if such negotiability issues were brought to the Council for initial adjudication. In those cases which involved alleged unfair labor practices, the Council, following its decision on the negotiability issue, would have to remand the matter to the Assistant Secretary for further action because section 6 of the Order charges the Assistant Secretary with responsibility for issuing decisions in unfair labor practice cases.

Moreover, as experience under the Order continues to grow, an increasing number of Council negotiability decisions will provide the Assistant Secretary with an ever-expanding body of authority upon which to draw in resolving cases where a unilateral action by one of the parties has given rise to an unfair labor practice complaint involving negotiability issues. As a result, instances in which he will be called upon to pass judgment on such issues on a first impression basis will tend to decline, thus reducing the opportunities for decisions to be made which would produce divergent precedents.

The Council also considered and rejected the alternative of requiring the Assistant Secretary to forward negotiability issues to the Council for determination when they appeared in the course of an unfair labor practice proceeding thus deferring his decision in the interim until the Council could resolve the issues concerned. Where negotiability issues arise in the

context of such unfair labor practice proceedings they are often inextricably intertwined with disputed issues of fact which must be resolved in order to arrive at a conclusion concerning the motivation of the parties. Such disputed issues of fact are best resolved through the adversary process of a formal hearing. For this reason, and because of the delays attendant in such a referral procedure, the Council does not believe that such an alternative is feasible or appropriate.

As a result of the foregoing considerations, we recommend that the Order be amended to provide the Assistant Secretary with express authority to resolve those negotiability issues which arise in the context of certain unfair labor practice proceedings—that is, those where a unilateral change in an established personnel policy or practice, or matter affecting working conditions, leads to a complaint that the acting party has refused, thereby, to negotiate. The Council recognizes that negotiability issues decided by the Assistant Secretary under such circumstances may involve matters of critical importance to one of the parties concerned where an expeditious resolution of the negotiability issue is particularly desirable. Equally important is the need to reduce any divergence between Assistant Secretary decisions and Council determinations of negotiability to the absolute minimum. Thus, the Council recommends, in addition, that the Order be revised to provide that a party adversely affected by an Assistant Secretary negotiability determination will have a right to have such a determination reviewed on appeal by the Council. In such an appeal, the parties would be permitted to raise any pertinent issues and arguments with respect to the negotiability dispute and the Council would revise its rules so to provide. Further, the Council would revise its rules so that appeals of this type will receive priority consideration.

RESPONDENT'S

BRIEF

(4)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-1715

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

ABERDEEN PROVING GROUND,
DEPARTMENT OF THE ARMY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The Federal Service Labor-Management Relations Statute, 5 U.S.C. (& Supp. IV) 7101 *et seq.*, provides that a federal agency's duty to bargain with its employees shall extend to a matter that is the subject of an agency regulation only if the Federal Labor Relations Authority (the Authority) has determined, under 5 U.S.C. 7117(b), that there is no "compelling need" for the regulation at issue. The question presented in this case is whether the procedure set forth in 5 U.S.C. 7117(b) is the only means by which the compelling need for an agency regulation may be challenged, or whether the Authority also has the power to resolve the compelling need issue in an unfair labor practice proceeding under 5 U.S.C. 7118.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The order of the court of appeals (Pet. App. 16a) summarily reversing the Federal Labor Relations Authority's (the Authority) decision is unreported, as is the court of appeals' order (Pet. App. 17a) denying the Authority's motion for an initial hearing en banc. The court's earlier decision in *United States Army Engineer Center, Fort Belvoir* v. *FLRA* (Pet. App. 52a-69a), upon which the court based its summary reversal in this case, is reported at 762 F.2d 409. The Authority's decision and order (Pet. App. 18a-51a) is reported at 21 F.L.R.A. No. 100.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1987. The petition for a writ of certiorari was filed on April 24, 1987, and was granted on October 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. 7117 provides in pertinent part:

* * * * *

(a)(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2)

of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

STATEMENT

A. The Federal Service Labor-Management Relations Statute

1. On October 13, 1978, President Carter signed into law the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (the Act). Title VII of the Act (5 U.S.C. (& Supp. IV) 7101 *et seq.*), entitled the Federal Service Labor-Management Relations Statute, "establishes a statutory basis for labor-management relations in the Federal service." H.R. Rep. 95-1403, 95th Cong., 2d Sess. 38 (1978). Title VII "thoroughly restructured federal labor re-

lations" (*National Federation of Federal Employees, Local 1669* v. *FLRA*, 745 F.2d 705, 706 (D.C. Cir. 1984)), replacing the federal labor relations program that had been created in 1962 by Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 comp.).[1]

Title VII protects the right of federal employees "to form, join, or assist any labor organization, or to refrain from any such activity" (5 U.S.C. 7102), and requires federal agencies to bargain in good faith with the exclusive representatives of units of employees about the terms and conditions of employment. See 5 U.S.C. 7102, 7114, 7116(a)(5) and (b)(5); *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 92 (1983) (BATF). The statute also outlines the matters that are "negotiable"—i.e., subject to the bargaining obligation. See 5 U.S.C. 7103(a)(12) and (14), 7117. An agency's refusal or failure to bargain in good faith about a negotiable proposal may constitute an unfair labor practice (5 U.S.C. 7116(a)(5)); whether it does so is determined in an unfair labor practice (ULP) proceeding under 5 U.S.C. 7118.

Title VII also establishes the Federal Labor Relations Authority (FLRA or Authority), a three-member independent body within the Executive Branch with responsibility for supervising the federal collective bargaining process under Title VII.[2] The Au-

[1] The executive order program was revised and continued by Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11,616, 11,636, and 11,838, 3 C.F.R. 305, 634, 957 (1971-1975 comp.). See pages 31-35 *infra*.

[2] The FLRA replaced the Federal Labor Relations Council, which had similar responsibilities under the executive order program.

thority adjudicates negotiability disputes, resolves bargaining unit issues and arbitration exceptions, conducts union elections, and engages in rulemaking. See 5 U.S.C. 7105(a)(2)(A)-(I). The FLRA may also issue orders against unfair labor practices (5 U.S.C. 7118) and may seek enforcement of those orders in appropriate United States courts of appeals (5 U.S.C. 7123(b)). Persons, including federal agencies, who are aggrieved by any final FLRA order may likewise seek judicial review in the courts of appeals (5 U.S.C. 7123(a)).

2. a. In enacting Title VII, Congress struck a delicate and deliberate balance between the rights of employees to bargain collectively and the "special requirements and needs of the Government" (5 U.S.C. 7101(b)). As President Carter explained when he transmitted the proposed legislation to Congress, "[t]he goal of th[e] legislation [is] to make Executive Branch labor relations more comparable to those of private business, while recognizing the special requirements of the Federal government and the paramount public interest in the effective conduct of the public's business." H.R. Doc. 95-299, 95th Cong., 2d Sess. 4 (1978), *reprinted in* Staff of the Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Comm. Print No. 9-67, Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 626* (Comm. Print 1979) [hereinafter *Leg. Hist.*].[3] Congress specified that Title VII

[3] See also 124 Cong. Rec. 33389 (1978) (Sen. Percy) (Title VII "represents a fair balance between the rights of employees to form and participate in bargaining units * * * and the

"must be construed in light of the paramount right of the public to as effective and efficient a Government as possible." H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 154 (1978). As this Court explained in the *BATF* case, Title VII "significantly strengthened the position of public employee unions," while at the same time "carefully preserving the ability of federal managers to maintain 'an effective and efficient Government' " (*BATF*, 464 U.S. at 92).

In particular, "the scope of collective bargaining is far narrower in the federal sector than in the private sector" (*FLRA* v. *OPM*, 778 F.2d 844, 845 (D.C. Cir. 1985) (footnote omitted)). In contrast to the National Labor Relations Act, for example, Section 7106(a) of Title VII expressly identifies certain "management rights" that are not negotiable. Under that provision, an agency may, free from the prospect of bargaining, "determine [its] mission, budget, organization, number of employees, and internal security practices" (5 U.S.C. 7106(a)(1)); "hire, assign, direct, layoff, and retain employees" or "suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees" (5 U.S.C. 7106(a)(2)(A)): "assign work," "make determinations with respect to contracting out," and "determine the personnel by which agency operations shall be conducted" (5 U.S.C. 7106(a)(2)(B)); select persons to fill positions (5 U.S.C. 7106(a)(2)(C)); and "take whatever actions may be necessary to carry out the agency mission during emergencies" (5 U.S.C. 7106(a)(2)(D)). And "[e]ven though the parties may execute a contract

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need of the Government to maintain the efficiency of its operations"); *NTEU* v. *FLRA*, 691 F.2d 553, 560-561 & nn.69-73 (D.C. Cir. 1982).

provision encompassing section 7106(a) matters, such agreement is invalid and may not be enforced." H. Robinson, *Negotiability in the Federal Sector* 18 (1981).[4]

b. One of the specific limitations on the duty of a government employer to bargain is set forth in Section 7117(a)(2), which provides that an agency's duty to bargain extends to matters covered by an agency-wide rule or regulation (or by a rule or regulation issued by a "primary national subdivision" of an agency) (5 U.S.C. 7117(a)(3)) "only if the Authority has determined under subsection (b) [5 U.S.C. 7117(b)] that no compelling need * * * exists for the rule or regulation" (5 U.S.C. 7117(a)(2)). Section 7117 thus strikes a balance: while it authorizes negotiations on matters covered by agency regulations, it also recognizes "that within every agency there exists a governmental mission which may not be compromised or negotiated away, in whole or in part, at the bargaining table." *AFGE* v. *FLRA*, 730 F.2d 1534, 1539 (D.C. Cir. 1984). Put another way, Section 7117 establishes a "workable accommodation between the objectives of promoting collective bargaining and preserving management authority in certain important areas." *Association of Civilian Technicians, Montana Air Chapter* v. *FLRA*, 756 F.2d 172, 178 (D.C. Cir. 1985).

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[4] Under 5 U.S.C. 7103(a)(14), the duty to bargain also excludes "policies, practices, and matters—(A) relating to political activities * * *; (B) relating to the classification of any position; or (C) to the extent such matters are specifically provided for by Federal statute." And under 5 U.S.C. 7117(a)(1), there is no duty to bargain about "matters which are the subject of * * * a Government-wide rule or regulation." *See Library of Congress* v. *FLRA*, 699 F.2d 1280, 1283-1284 & n.16 (D.C. Cir. 1983).

c. Title VII provides procedures for determining whether a proposal is "negotiable" and, in cases where a labor representative alleges that an agency-wide regulation does not bar negotiations because there is no "compellling need" for the regulation, for determining compelling need. An ordinary negotiability question, such as whether a proposal would traverse "management rights," may be resolved in a ULP proceeding after management has refused to bargain; such a question may also be resolved by what the parties agree is an optional alternative procedure, a "negotiability appeal" by the union, to the FLRA, under 5 U.S.C. 7117(c).

A different subsection, 5 U.S.C. 7117(b), provides a separate, and we believe exclusive, procedure for deciding whether there is a compelling need for an agency regulation. Section 7117(b)(1) provides that "[i]n any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation * * * which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine * * * whether such a compelling need exists". In making this determination, the Authority may hold a hearing (5 U.S.C. 7117(b)(3)). Unlike a ULP proceeding (compare 5 U.S.C. 7118), a Section 7117 hearing "shall be expedited to the extent practicable and shall not include the "Authority's] General Counsel as a party" (5 U.S.C. 7117 (b)(3)), but shall include the agency or primary national subdivision as a necessary party (5 U.S.C. 7117(b)(4)). And whereas a ULP proceeding may result in the retroactive imposition of sanctions against the agency (see 5 U.S.C. 7118(a)(7)), a finding of no compelling need under Section 7117 has

only the prospective effect of requiring the agency, or the local employer, to negotiate over the subject matter purportedly covered by the agency regulation. See *FLRA* v. *OPM*, 778 F.2d 844, 846 & n.11 (D.C. Cir. 1985).

B. The Present Controversy

1. The present case arose on September 14, 1981, when, in an effort to conserve energy, respondent decided to close operations at the Aberdeen Proving Ground (APG or Aberdeen) for the three days after Thanksgiving, November 27-29, 1981. On September 15, David R. Weppner, respondent's labor relations specialist, met with representatives of the various unions representing APG employees and notified them that, as a result of the decision to curtail operations, all APG employees would be obliged to take annual leave on Friday, November 27. Pet. App. 34a-35a.

On October 6, respondent met with union representatives to discuss how the closure plans would be implemented. Colonel Robert P. Jones, who chaired the meeting, reiterated that employees would have to take annual leave on November 27, and that if an employee had not accrued annual leave time he could be advanced leave time, take compensatory time, take leave without pay, or would be permitted to work. Pet. App. 36a. Following the meeting, respondent invited the unions "to negotiate concerning the impact and implementation of th[e] decision" (*id.* at 37a (citation omitted)).

Negotiations took place on October 19, 1981. Union representatives proposed that instead of having to take annual leave employees be granted administrative leave (Pet. App. 38a). Weppner, representing respondent, rejected this proposal, explaining

that " 'the rules and regulations * * * do not permit him to do this and that it verges on nonnegotiability in his opinion' " (*ibid.* (citation omitted)). Respondent relied in particular on Army and Department of Defense regulations that generally prohibit granting administrative leave when at least 24 hours' notice of an anticipated closure can be given.[5]

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[5] DA Regulation CPR 990-2 provides in relevant part (Pet. App. 42a-43a (quotation marks omitted)):

> S3-2. *Relieving Daily, Hourly, or Piecework Employees From Duty*
>
> * * * * *
>
> c. *Where advance notice can be given.* The Authority to excuse employees administratively is not to be used in instances where the period of interrupted or suspended operations can be anticipated sufficiently in advance to permit arranging for assignment to other work or the scheduling of annual leave. Normally, where 24 hours' advance notice can be given, employees who cannot be assigned to other work must be placed on annual leave with or without their consent.

DOD Regulation 1400.25-M provides in relevant part (Pet. App. 43a (quotation marks omitted)):

> S3-1 * * *
>
> d. *Limitation on Authority to Dismiss Employees Without Charge to Leave*
>
> * * * * *
>
> (2) When, because of planned management reasons, the closing of all or part of an activity is required for short periods of time, employees will be notified no less than one full work shift in advance and will be required to take annual leave unless leave without pay is requested.
>
> (3) Group dismissal authority will not be used to create a holiday.

2. The International Association of Machinists and Aerospace Workers (the union) thereafter filed a ULP charge, alleging among other things that respondent had violated 5 U.S.C. 7116(a)(1) and (5) by refusing to bargain over the union's proposal that administrative leave be granted when APG was closed on November 27. On June 15, 1982, the administrative law judge ruled in respondent's favor and recommended that the Authority dismiss the union's complaint (Pet. App. 33a-51a). The ALJ found that "[r]espondent's reliance on the DOD and DA Regulations as the basis for its rejection of [the union's] demand for administrative leave was in good faith" (*id.* at 43a). Noting that the DOD regulations were " 'agency' regulations within the meaning of [5 U.S.C. 7117(a)(2) and (3)]" and that "the DA Regulations were issued by a 'primary national subdivision of said agency' within the meaning of [5 U.S.C. 7117(a)(3)]," the ALJ explained that under Section 7117(a)(2) the agency therefore had a duty to bargain over the administrative leave proposal " 'only if the Authority has determined under [Section 7117(b)] that no compelling need * * * exists for the rule or regulation' " (Pet. App. 44a). Because "[t]he Authority ha[d] made no such determination [with respect to] * * * either the DOD or the DA Regulation" (*ibid.*), the ALJ concluded that "[r]espondent was under no duty to bargain as to the grant of administrative leave for November 27, 1981" (*id.* at 45a).

3. The Authority reversed (Pet. App. 18a-32a). It first rejected respondent's contention (*id.* at 21a) that "it had no duty to establish a compelling need for its regulations without the issue having been raised by the Union under the Authority's negoti-

ability procedures." The Authority acknowledged (*id.* at 22a-23a) that "when an agency refuses to bargain over a union proposal during ongoing collective bargaining negotiations because the proposal is alleged to be inconsistent with an existing agency-wide regulation for which a compelling need exists, section 7117 of the Statute requires that the issue be resolved through the procedures in section 7117 of the Statute and Part 2424 of the Authority's Rules and Regulations." But relying on its prior decision in *Defense Logistics Agency*, 12 F.L.R.A. 412 (1983), aff'd *sub nom. Defense Logistics Agency* v. *FLRA*, 754 F.2d 1003 (D.C. Cir. 1985), the Authority held (Pet. App. 23a) that "[a] different situation is presented" when an agency is alleged to have made "unilateral changes in conditions of employment" and "issues of negotiability—including, as in the instant case, assertions of compelling need for agency regulations—are raised as affirmative defenses" (*ibid.*). In such cases, the Authority stated (*ibid.*), the question of whether there exists a compelling need for an agency-wide regulation may be resolved in two different ways: "[T]he Authority has promulgated procedures * * * which recognize a union's right either: (1) to seek resolution of the entire dispute, including the negotiability issues, in the unfair labor practice forum; or (2) to seek initial and separate resolution of the negotiability issues in the negotiability appeal forum" (*ibid.*).

In reaching this conclusion, the Authority reasoned that in the private sector issues of negotiability may be resolved in unfair labor practice proceedings and it discerned nothing in the Act or in its legislative history to "suggest[] that Congress intended to make an exception in the federal sector to this principle" (Pet. App. 23a-24a). The Authority said that the negotiability appeals procedures contained in Section 7117(b) do not "preclude the Authority from resolving any necessary negotiability issues, including those related to the compelling need for an agency regulation, in a unilateral change unfair labor practice case" (Pet. App. at 24a). And it found confirmation for that view in the "pre-Statute labor-management relations program, Executive Order 11491, [which] authorized precisely what the Authority's procedures * * * were promulgated to permit: unified processing of any compelling need negotiability issue in the unfair labor practice proceeding in which it arises" (*id.* at 25a (footnote omitted)). The Authority asserted that its approach to the determination of compelling need issues "effectuates Congress' goal to facilitate and promote the collective bargaining process by providing for the resolution of all relevant issues in one proceeding, thereby obviating the delay inherent in two separate and consecutive proceedings" (*ibid.*).

Having decided that the compelling need for the regulations in this case could be resolved in the ULP proceeding, the Authority next found that respondent had "failed to sustain its burden of establishing a compelling need for the DOD and DA regulations in accordance with * * * the Authority's Rules and Regulations" (Pet. App. 27a). It held that respondent had not shown that the regulations in question promoted the "goal of conserving energy" in that "[t]he record is barren of evidence which would demonstrate how the granting of administrative leave to unit employees, rather than annual leave, as the Union's proposal at issue here would require, in any way affects the Respondent's stated objective

of conserving energy" (*ibid.*). The Authority accordingly held that respondent had violated Section 7116(a)(1) and (5) when it refused to negotiate concerning the administrative leave proposal (Pet. App. 28a). It ordered respondent to cease and desist from its refusal to negotiate, and it granted certain additional affirmative relief (*id.* at 28a-30a).

4. Relying on its earlier decision in *United States Army Engineer Center, Fort Belvoir* v. *FLRA*, 762 F.2d 409 (Pet. App. 52a-69a), the court of appeals, in an unpublished order, summarily reversed (*id.* at 16a). In *Fort Belvoir*, a union instituted a ULP proceeding under Section 7118 when Fort Belvoir, a component of the Department of the Army, refused to negotiate concerning an Army regulation that established a new performance appraisal system. As in the present case, the Authority decided in the context of the ULP proceeding that there was no compelling need for the Army regulation. The court of appeals reversed, holding (Pet. App. 57a-58a (emphasis in the original)) that "[t]he Federal Labor Management Relations Act states in unambiguous terms that, where an agency regulation is asserted as a bar to negotiations between a governmental employer and a union, the FLRA must determine that no compelling need for the regulation exists *before* any duty to bargain arises on the part of the employer." The court observed further that "[i]t is illogical, in light of this language, to maintain that a union could charge an agency with 'having engaged in or engaging in an unfair labor practice,' 5 U.S.C. § 7118(a), because the employer has refused to bargain over subject matter as to which no duty to bargain *has been determined* to exist" (*id.* at 61a (emphasis in the original)). The court examined the

legislative history of the Act and concluded that Congress had deliberately chosen "to provide *separate* avenues of negotiability appeals and unfair labor practice proceedings to resolve different kinds of questions" (*id.* at 67a (emphasis in the original)). Noting in particular the procedural differences between a negotiability appeal under Section 7117(b) and a ULP proceeding, the court held that Congress intended under Section 7117 "to give a governmental agency the 'flexibility to issue and revise regulations which the agency deems are essential to accomplish its executive function,' * * * while protecting the agency from the risk of thereby incurring the sanctions of an unfair labor practice proceeding" (Pet. App. 69a). The court accordingly concluded (*ibid.*) that "Congress meant the § 7117(b) negotiability appeal to be the sole means of determining a compelling need question under the statute."

SUMMARY OF ARGUMENT

A government employer has a duty to bargain in good faith, but only over "negotiable" issues. The question whether an issue is negotiable may ordinarily be answered either in an unfair labor practice proceeding brought by the union after the employer has refused to bargain, or (at the union's option) in a "negotiability appeal" taken by the union under 5 U.S.C. 7117(c) after the employer has asserted that an issue is nonnegotiable. But Congress designed a different procedure to be followed when a governmental employer asserts that a bargaining proposal is nonnegotiable because it is governed by an agency-wide regulation, and the union contends that there is no compelling need for the regulation. In that event, 5 U.S.C. 7117(a) and (b) provide a

separate procedure for determining the compelling need for the regulation, and thus whether the proposal is negotiable. The court of appeals ruled, we believe clearly correctly, that this separate procedure is exclusive, and that the allegation of "no compelling need" may not be resolved in an unfair labor practice proceeding.

A. The plain language of the statute is dispositive. Section 7117(a)(2) states that "[t]he duty to bargain in good faith shall * * * extend to matters which are the subject of any agency rule or regulation * * * *only if* the Authority *has determined under subsection (b)* of this section that no compelling need * * * exists for the rule or regulation" (emphasis added). Unless and until the Authority "has determined" compelling need, a government employer, such as Aberdeen, has no duty to bargain over matters covered by the regulations of the agency (such as DOD) or primary national subdivision (such as the DA) of which it is a part, and thus cannot have committed a ULP. Section 7117(a)(2) provides that compelling need shall be determined "under subsection (b)"; it does not suggest that the ULP process would do just as well. The language of Section 7117(b), in turn, confirms that the procedures in that section are exclusive: Section 7117(b)(1) states that "in any case of collective bargaining" in which the compelling need for agency regulations is put in issue, the Authority "shall determine" compelling need "under paragraph (2)" of the section. This language contrasts sharply with the language of Section 7117(c), which applies to all negotiability appeals "except in a case to which subsection (b) * * * applies." Section 7117(c) expressly gives the union an optional alternative to proceeding by way of the ULP process;

it provides that "the exclusive representative may appeal the allegation [of nonnegotiability] to the Authority."

B. There are two evident reasons for requiring that compelling need issues be determined in advance of and outside the ULP forum. Unlike an ordinary negotiability dispute between a particular government employer and a union, a compelling need inquiry calls into question the importance and legitimacy of the agency's regulations; the present case, for example, involves not merely a dispute between the union and Aberdeen, which would ordinarily defend a ULP charge, but a challenge to regulations that the Department of Defense and the Department of the Army consider to be within their prerogatives. Congress therefore provided in Section 7117(b) a special procedure in which the agency would have the right to explain and defend its own regulations, in an expedited proceeding before the FLRA itself. Second, Congress evidently did not want to place agencies in the position of adopting regulations—at least any regulation that may change a condition of employment (a term that is broadly defined under Title VII (see 5 U.S.C. 7103(a)(14)), at the peril of ULP sanctions. It wanted instead to provide a proceeding in which the only adverse consequence of a determination of "no compelling need" is that there would then be a duty to bargain.

C. The history of the statute confirms that Section 7117(b) is the only means for resolving compelling need issues. Indeed, in connection with nearly identical "compelling need" language in a precursor to Section 7117, Congress considered the very question presented in this case and rejected the interpretation urged by the Authority. Petitioner's contrary view,

predicated on the supposed pre-Act practice under the Executive Orders, is mistaken. Although Executive Order No. 11,838 authorized the Assistant Secretary of Labor to resolve negotiability issues in a ULP proceeding, there is no evidence that the Assistant Secretary was authorized to decide compelling need issues. To the contrary, Executive Order No. 11,838, and the Report and Recommendations on which it was based, explicitly established a separate and different procedure for resolving compelling need questions.

D. Largely ignoring the text, and finding the formal legislative history of Title VII silent on the question presented (see Br. 13, 30, 33), petitioner relies on certain "considerations of public policy" to support its construction of the statute (Br. 42). It insists that "it is in the interest of the efficient and effective administration of the Statute that all issues which arise in an unfair labor practice dispute be resolved in that unfair labor practice proceeding" (Br. 42-43). And it asserts that there are "no drawbacks" to its approach. But it is not clear that a ULP proceeding is an efficient way to resolve "compelling need" issues, much less that such an approach would promote the efficiency of the Government as a whole. And in any event, these untethered policy claims cannot justify an interpretation so plainly at odds with the text and evident purpose of the statute. "Although Congress certainly could have adopted the model of collective bargaining advanced by [petitioner], we find no indications in the Act or its legislative history that it intended to do so." *BATF* v. *FLRA*, 464 U.S. at 103.

ARGUMENT

SECTION 7117(b) PROVIDES THE ONLY PROCEDURE FOR CHALLENGING THE COMPELLING NEED FOR A REGULATION ISSUED BY AN AGENCY OR PRIMARY NATIONAL SUBDIVISION

Ordinary negotiability disputes under Title VII may be litigated either in an unfair labor practice proceeding or in a "negotiability appeal" under Section 7117(c). But Congress recognized that where a matter is alleged to be nonnegotiable because it is governed by an agency regulation, and that regulation is alleged to lack a compelling need, there are important reasons to resolve the compelling need issue in a separate, expedited, and exclusive procedure before the FLRA, to which the agency that issued the regulation is invited and the Authority's General Counsel is not. Congress articulated its intentions in the text of Title VII, and it expressed its interpretation of that text in the legislative history. The competing policy considerations on which petitioner relies are mistaken in fact, and in any event cannot override the plain meaning of the statutory provisions.

A. The Language of the Statute Plainly Indicates That Section 7117(b) is the Only Procedure for Challenging Compelling Need

"[W]e begin with the relevant provisions of [Title VII], which is where an unsophisticated lawyer or layman would probably think we should begin." *Carter* v. *Kentucky*, 450 U.S. 288, 308-309 (1981) (Rehnquist, J., dissenting). As this Court has explained many times, "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded

as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Accord *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 10 n.12; *Aaron* v. *SEC*, 446 U.S. 680, 695 (1980); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). Here, the language and structure of Title VII leave no doubt that Congress intended the negotiability appeal procedures in Section 7117(b) to be the exclusive means for challenging the compelling need for an agency-wide or primary-national-subdivision-wide regulation.[6]

1. Section 7117(a)(2) provides that "[t]he duty to bargain in good faith shall • • • extend to matters which are the subject of any agency rule or regulation [issued by an agency or primary national subdivision] *only if* the Authority *has determined under subsection* (*b*) of this section that no compelling need • • • exists for the rule or regulation" (emphasis added). This language is altogether inconsistent with permitting a union—as the Authority did here—to demand to bargain over a matter squarely covered by agency regulations and defend that demand by contending for the first time in the ensuing unfair

[6] Petitioner's failure to come to grips with the statutory language of Title VII is epitomized by its assertion (Br. 3-4) that Section 7117(a)(2) provides that "there is • • • no duty to bargain over proposed contract language which would bring about an inconsistency with either an agency regulation or a regulation of an agency's primary national subdivision whenever the Authority determines, under the criteria set forth in 5 C.F.R. 2424.11, that a compelling need exists for the regulation." What Section 7117(a)(2) actually says is (i) that there is no duty to bargain unless the Authority has determined that there is *no* compelling need and (ii) that such a determination shall be made "under subsection (b) of this section."

labor practice proceeding that there is no "compelling need" for the regulation. First, the language makes it clear that the agency simply has no duty to bargain unless and until the Authority "has determined" that there is no compelling need. As the court of appeals observed in *Fort Belvoir*, "[i]t is illogical, in light of this language, to maintain that a union could charge an agency with 'having engaged in or engaging in an unfair labor practice,' 5 U.S.C. 7118 (a), because the employer has refused to bargain over subject matter as to which no duty to bargain *has been determined* to exist" (Pet. App. 61a (emphasis in the original)). Second, the language of Section 7117(a)(2) makes it clear that compelling need may "only" be determined "under subsection (b)"—not in a ULP forum.

The role of the Authority's General Counsel in unfair labor practice proceedings appears to confirm this reading of Section 7117(a)(2). A ULP proceeding under Section 7117 is commenced when a charge is filed with the General Counsel of the Authority. The General Counsel must then "investigate the charge" and "may issue and cause to be served upon the agency or labor organization a complaint." If the General Counsel concludes that the "complaint fails to state an unfair labor practice," he "shall provide the person making the charge a written statement of the reasons for not issuing a complaint." 5 U.S.C. 7118(a)(1); 5 C.F.R. 2423.10(a). Where contravention of an agency-wide regulation is involved, the General Counsel cannot, we suggest, conclude that a refusal-to-bargain charge states an unfair labor practice, and file a complaint, unless the Authority "has determined under subsection (b)" that there is no compelling need for the regulation. Were he to do so without a prior Authority determination, the premise

for the complaint would be false, and the General Counsel, who is expressly excluded from participating in compelling need determinations under Section 7117(b), would instead be playing the leading role in seeking a determination of no compelling need. See generally *Turgeon* v. *FLRA*, 677 F.2d 937 (D.C. Cir. 1982).

2. Section 7117(b) sets forth the basic framework for Authority determinations of compelling need, and its language strongly reconfirms that these procedures are exclusive. Section 7117(b)(1) states:

> In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation [issued by any agency or by a primary national subdivision of such agency] which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority whether such compelling need exists.

The provision applies by its terms to "any case of collective bargaining" in which there is a claim by an exclusive representative that no compelling need exists for any agency regulation; it contains no exceptions. The language ("shall determine") is "mandatory and unequivocal." *Rodriquez* v. *Compass Shipping Co.*, 451 U.S. 596, 602 (1981). Using "the imperative voice" (*Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979) (footnote omitted)), Section 7117(b)(1) directs the Authority to assess compelling need "under paragraph (2)" of Section 7117(b); there is no suggestion that the question can await, or be decided in, a ULP proceeding.

Section 7117(b)(3) and (4), which set out the procedures that the Authority is to follow in assessing compelling need, establish a procedural framework quite different from a ULP proceeding. The FLRA is authorized to convene a "compelling need" hearing, which "shall be expedited to the extent practicable and shall not include the General Counsel as a party" (5 U.S.C. 7117(b)(3)). Moreover, "[t]he agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing" (5 U.S.C. 7117(b)(4)). As we argue further below (see pages 28-29, *infra*), it is inconsistent with these requirements to infer the existence of a separate ULP procedure, available at the option of the employee bargaining representative, in which none of these requirements applies.

3. Finally, the contrast between the mandatory language of Section 7117(b), which deals with questions of compelling need, and the language of Section 7117(c), which deals with ordinary negotiability issues, further demonstrates that the Section 7117(b) procedure is exclusive. Section 7117(c) creates an expedited appeal process to resolve negotiability issues "[*e*]*xcept* in any case to which subsection (b) of this section [governing compelling need] applies" (emphasis added). Section 7117(c)(1) states that "if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative *may appeal* the allegation to the Authority in accordance with the provisions of this subsection" (emphasis added). This section says "may appeal"—a "permissive, not mandatory" term (*Terre Haute & Indianapolis R.R.* v. *Indiana*, 194 U.S. 579, 588 (1904))—because Congress sought only

to create an optional alternative to the ordinary procedure of testing management's refusal to bargain by filing an unfair labor practice charge under Section 7118. See *AFGE* v. *FLRA*, 778 F.2d 850, 853 & n.4 (D.C. Cir. 1985); *National Fed'n of Fed. Employees, Local 1167* v. *FLRA*, 681 F.2d 886, 890 & n.6 (D.C. Cir. 1982).

By contrast, the language of Section 7117(a)(2) and (b)(1)—"only if the Authority has determined under subsection (b)"; the Authority "shall determine"—is not permissive. Cf. *Escoe* v. *Zerbst*, 295 U.S. 490, 493-494 (1935). As the court of appeals explained (Pet. App. 61a) in the *Fort Belvoir* case, "'[o]nly' is a highly singular word. It does not suggest alternatives or choice." And the difference between "the Authority shall determine" in Section 7117(b)(2) and "[the union] may appeal" in Section 7117(c) could not be plainer: "In the first the word 'shall' and in the latter provision the word 'may' is used, indicating command in the one and permission in the other." *United States* v. *Thoman*, 156 U.S. 353, 360 (1895). See also *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U.S. 649, 662-663 (1923); *Thompson* v. *Roe*, 63 U.S. (22 How.) 422, 434 (1860). In using this statutory structure, Congress "demonstrated that it knew how to provide [for alternative means of resolving negotiability disputes] when it wished to do so elsewhere in the very 'legislation cited.'" *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981) (quoting *Galloway* v. *United States*, 319 U.S. 372, 389 (1943)). "Under traditional principles of statutory construction," the difference between the sections must therefore be seen as intentional.[7] *Fedorenko* v. *United States*, 449 U.S. 490,

[7] Congress enacted both the compelling need provisions and the provisions in Section 7117(c) at the same time, and

512 (1981). See *Lawrence County* v. *Lead-Deadwood School District No. 40-1*, 469 U.S. 256, 267 (1985); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). The court of appeals was thus manifestly correct when it concluded in *Fort Belvoir* (Pet. App. 67a (emphasis in the original)) that Congress deliberately chose "to provide *separate* avenues of negotiability appeals and unfair labor practice proceedings to resolve different kinds of questions."[8]

"'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). Accord *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 10. See also *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148-149 (1980); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19-20 (1979).

[8] Petitioner repeatedly contends (Br. 13-14, 18, 30, 34-35, 41) that because Section 7117(c) enables a union to litigate certain negotiability issues either in a negotiability appeal or in a ULP forum, Section 7117(b) should be construed to give the union the same choice with respect to compelling need. We agree that Section 7117(c) is persuasive evidence of congressional intent; but for the reasons stated, we believe that the Authority has drawn precisely the wrong lesson from its provisions. Petitioner also observes (Br. 34-35 & n.30) that all but one of the procedures available under Section 7117(b) for resolving compelling need questions are likewise available under Section 7117(c) for deciding other negotiability appeals. It accordingly asserts that the decision to include those procedures in Section 7117(b) cannot be taken as evidence that Congress intended that section to preclude alternative relief in a ULP proceeding. But the Authority nowhere responds to two central points. First, as we have noted (see pages 23-24, *supra*), Section 7117(c) is explicitly permissive; it states that the union *may* select a negotiability

B. The Decision to Make Section 7117(b) the Only Procedure for Challenging Compelling Need Serves Important Purposes

Congress had two obvious reasons for requiring that compelling need issues be determined outside the ULP process. First, a compelling need inquiry is not merely a dispute between the government employer and the union that is resolved through the machinery of the FLRA; it is a challenge to the importance of regulations that otherwise have the force of law. Second, agencies should not be placed in the position of adopting regulations at their peril, subject to ULP sanctions as a result of a straightforward application of a regulation during the bargaining process.

1. Other negotiability issues—which simply require the Authority (or its delegated representative) to "'measure[]' specific and delimited bargaining proposals 'against applicable law, rules or regulations in order to determine whether a given proposal is within the duty to bargain'" (*FLRA* v. *OPM*, 778 F.2d at 847 (citations omitted))—are merely disputes between a particular government employer

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appeal as an alternative to the ULP forum. Second, the one procedural difference between Section 7117(b) and Section 7117(c) is crucial: in a Section 7117(b) hearing—but not in a Section 7117(c) hearing—the agency is a necessary party. Petitioner suggests (Br. 34-35 n.30) that that requirement was designed merely to give the issuing agency "an opportunity to waive the regulation as a bar to bargaining." But the agency is already afforded such an opportunity under Section 7117(b)(2)(A); and if it exercises a waiver, no compelling need hearing is even held. If it chooses not to waive, however, a hearing is available, and the agency is a necessary party—not so that it may enjoy a second waiver opportunity, but for the obvious and salutary purpose of permitting the agency to defend the importance of its own regulation.

(such as Aberdeen) and the representative of its employees. But a challenge to the "compelling need" for a regulation promulgated by an agency (such as DOD) or primary national subdivision (such as DA) is a challenge of a different order: it *ought* to be resolved in a proceeding (1) that focuses on the need for the regulation (rather than the particular bargaining dispute); (2) that is conducted before the Authority itself; and (3) in which the agency has an opportunity to participate and defend its regulations.[9]

The Authority's "criteria for determining compelling need" (5 C.F.R. 2424.11) show how important it is that the agency itself participate and defend its regulations in relation to its overall mission. Under petitioner's "illustrative criteria," an agency bears the "stringent" (Br. 26) burden to "demonstrate", among other things, that its "rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission * * * of the agency" (5 C.F.R. 2424.11(a)), or that "the rule or regulation is necessary to insure the maintenance of basic merit principles" (5 C.F.R. 2424.11(b)).[10] See *AFGE* v. *FLRA*, 730 F.2d at 1539. In

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[9] Recognizing the especially intrusive nature of the compelling need inquiry, Congress has provided that, in the absence of a determination by the Authority, compelling need may only be found lacking when "the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist" (5 U.S.C. 7117(b)(2)A)).

[10] Petitioner acknowledges (Br. 25) that it imposes the burden of proof on the agency. See 5 C.F.R. 2424.11; *AFGE, Social Security Local 3231 & Dep't of Health & Human Services, Social Security Adm'n*, 16 F.L.R.A. 47, 48 (1984); *NTEU, Chapter 207 & FDIC Corp.*, 14 F.L.R.A. 598, 599

its decisions, the Authority has consistently rejected compelling need claims where agency regulations were merely "helpful to the accomplishment of the Agency's mission or the execution of its functions" but not "essential to those objectives." *National Fed'n of Fed. Employees, Local 1445 & Alabama Air Nat'l Guard*, 16 F.L.R.A. 1094, 1102 (1984). As the Authority has put it, "*essentiality* is the measure" of compelling need (*NTEU & FDIC Corp.*, 14 F.L.R.A. 179, 180 (1984) (emphasis in original)). And under that rigorous standard, the Authority has held that even if a "deviation" from a regulation would "pose administrative difficulty, [that would] not in itself demonstrate that the regulation meets the compelling need criteria" (*id.* at 181). Accord *AFGE, Local 2670 & Army & Air Force Exchange Service*, 10 F.L.R.A. 71, 75 (1982).[11]

It is hardly surprising that Congress decided that the ULP process was not an appropriate means to

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(1984); *AFGE, Local 1928 & Dep't of the Navy*, 2 F.L.R.A. 451 (1980).

[11] The Authority's predecessor under the Executive Orders, the Federal Labor Relations Council, whose regulations governing compelling need were substantially the same as the Authority's present regulations (see H. Robinson, *Negotiability in the Federal Sector* 16 n.31 (1981)), explained that its compelling need criteria established "a stringent standard" and that they "were designed and adopted to the end that internal 'agency regulations not *critical* to effective agency management or the public interest' would be prevented from resulting in negotiations at the local level being 'unnecessarily constricted'" (*id.* at 17 (emphasis in the original)). In view of the Authority's approach to compelling need, it is hardly surprising that petitioner could find only 12 out of 85 cases (see Br. 26-27 & n.24), in which a claim of compelling need was upheld by the FLRA.

determine compelling need: a ULP proceeding is ill-suited to careful focus on the reasons and justifications for an agency's regulations. First, the participants are wrong: a ULP proceeding must be initiated and prosecuted by the General Counsel, see *Turgeon* v. *FLRA*, 677 F.2d 937, 939-940 (D.C. Cir. 1982); S. Rep. 95-969, 95th Cong., 2d Sess. 102 (1978), who is expressly denied any role in a Section 7117(b) proceeding;[12] along the way, the Authority or its delegated representative may permit "any person * * * to intervene in the hearing and to present testimony" under informal rules of evidence that are not set by statute or common law (5 U.S.C. 7118(a)(6)); while the agency that issued the regulation has the right to file an answer in and appear at the ULP proceeding (5 U.S.C. 7118(a)(3)), it is not a necessary party, and the employer at the local level is typically the litigating defendant; and under the ULP provisions, the hearing is conducted by the Authority or "any individual employed by the Authority for such purpose" (5 U.S.C. 7118). Second, in contrast to a Section 7117(b) hearing, which focuses exclusively on the issue of compelling need and which "shall be expedited to the extent practicable" (Section 7117(b)(3)), a ULP proceeding must resolve other issues and decide whether "the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice" (5 U.S.C. 7118(a)(7)).

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[12] The evident reason for this is that the General Counsel, as the prosecutor in the ULP forum, is chiefly responsible for the presentation of the merits of unfair labor practice complaints and should not have the additional duty to assist in resolving the threshold question of compelling need for agency-wide regulations.

2. An agency should not have to adopt regulations at its peril. In petitioner's view (see *Defense Logistics Agency* v. *FLRA*, 754 F.2d 1003 (D.C. Cir. 1985)), whenever an agency issues a new regulation a component may later be found guilty of an unfair labor practice if it applies the regulation straightforwardly during collective bargaining but there is later found to be no compelling need for the regulation. That is surely wrong: an unfair labor practice finding under Section 7118 exposes the agency to various retroactive sanctions (see 5 U.S.C. 7118(a)(7); *Defense Logistics Agency*, 754 F.2d at 1006 n.7); as the court of appeals observed in *Fort Belvoir* (Pet. App. 62a), the Authority's approach "would hamstring an agency's ability to institute new regulations even when it perceives a compelling need for the change," and that result could not be avoided because the Authority's construction would "allow the expedited negotiability appeal procedure to be bypassed whenever a new regulation is instituted or an old one is modified" (*ibid.*). By contrast, a determination of no compelling need under Section 7117(b) results only in a prospective order to bargain (see *Defense Logistics Agency*, 754 F.2d at 1006 n.7), which "enables a government agency to act in furtherance of its essential mission without facing the charge and possible sanctions of an unfair labor practice" (Pet. App. 62a).

C. The History of Title VII Confirms That Section 7117(b) Provides the Exclusive Procedure for Challenging Compelling Need

Petitioner asserts (Br. 14-15, 20-24, 37-42) that its construction of Title VII accords with "established Executive Order practice which predated the Statute" (Br. 37). Beyond that, however, the Authority finds

"no indication * * * in [the] legislative history that Congress intended [Section 7117(b)] to foreclose resolution of defenses of nonnegotiability, including compelling need issues, in unilateral change unfair labor practice cases" (Br. 13). Both propositions are mistaken. The Executive Orders established a separate and distinct procedure for resolving compelling need claims, and there is no reason to believe that under "established Executive Order practice" ULP proceedings were intended to be an acceptable alternative. Moreover, the legislative history of Title VII—far from offering "no indication[s]" (Br. 30) on the question—confirms that Congress considered the very issue presented in this case and rejected the interpretation offered by the Authority. Although it created alternative procedures—an expedited appeal process in addition to the ULP forum—to decide *other* negotiability issues, Congress indicated that it fully intended to make the procedure established by Section 7117(b) the exclusive means for resolving compelling need questions.

1. "Prior to enactment of Title VII, labor-management relations in the federal sector were governed by a program established in a 1962 Executive Order" (*BATF* v. *FLRA*, 464 U.S. at 91 (footnote omitted)), and amended thereafter by subsequent Executive Orders (see *id.* at 91 n.2). For the greater portion of that period, matters covered by agency-wide regulations were entirely non-negotiable, regardless of the compelling need for the regulation. Executive Order No. 11,491, issued on October 29, 1969, stated that agencies and labor organizations could "confer in good faith with respect to personnel policies and practices" but only to the extent "set forth in * * * published agency policies and regula-

tions" (§ 11(a), *Leg. Hist.* 1250)). While a labor organization could appeal to the Federal Labor Relations Council, predecessor of the FLRA, if it believed that a bargaining proposal did not actually conflict with a particular agency regulation (§ 11(c)(4)(i), *Leg. Hist.* 1251), it could not challenge the compelling need for the regulation. And only the Council could decide negotiability issues; in a 1971 Report, the Council expressly rejected a proposal to amend the Executive Order to permit negotiability issues to be processed in unfair labor practice proceedings (*Leg. Hist.* 1266).

In January 1975, the Council issued a Report and Recommendations that proposed a number of amendments to the Executive Order. See *Leg. Hist.* 1283-1335. Two separate Council recommendations, ultimately adopted as part of Executive Order No. 11,838 in February 1975 (see *Leg. Hist.* 1338, 1339), are pertinent. The first recommendation was to modify the extent to which agency regulations could bar negotiations. The Council observed that under the existing Order "meaningful negotiations at the local level on personnel policies and practices and matters affecting working conditions have been unnecessarily constricted in a significant number of instances by higher level agency regulations not critical to the effective agency management or the public interest" (*Leg. Hist.* 1306-1307). The Council recognized that "agency regulatory authority must be retained" (*ibid.*), but it concluded that "modifications in the present role of internal agency regulations as a bar to negotiations should be adopted, consistent with essential agency requirements" (*id.* at 1307). The Council therefore recommended that agency regulations "bar negotiations at the local level only if

a 'compelling need' for such regulations exist" (*id.* at 1306).

To implement this new rule, the Council proposed a detailed set of procedures. First, "disputes as to whether an agency regulation * * * meets the standard of 'compelling need' should be resolved by the Council on a case-by-case basis in negotiability appeals filed under section 11(c) of the Order" (*Leg. Hist.* 1307). Second, consistent with a policy of deference to agency prerogatives, the Council proposed that a negotiability appeal not be entertained "unless the labor organization first requests * * * an exception to the regulation from the agency head and such exception is denied or not acted upon" (*id.* at 1310). Finally, to avoid "an unnecessary multiplication of challenges * * * [that] would unreasonably burden and impede the effective operation of the program," the Council recommended that compelling need appeals "may be filed only by the national president of a labor organization (or his designee) or the president of a labor organization not affiliated with a national organization (or his designee)" (*id.* at 1311).

The Council's second recommendation, likewise adopted in the Executive Order, proposed a modification of the portion of Executive Order No. 11,491 under which only the Council was authorized to resolve negotiability questions. See *Leg. Hist.* 1323-1329. Because of that exclusive authorization to the Council, the Assistant Secretary of Labor, who was otherwise authorized to decide charges of unfair labor practices (see *id.* at 1325), had "consistently ruled that a party may not utilize the unfair labor practice provisions * * * as a means for resolving negotiability disputes" but could only file an unfair labor practice charge "where the matter excluded from negotiation

has already been determined to be negotiable through the procedures set forth in section 11(c) of th[is] Order" (*ibid.*). The Council concluded that that procedure involved "[u]nnecessary additional steps" (*ibid.*) and noted that negotiability issues that arise in ULP proceedings "are often inextricably intertwined with disputed issues of fact which must be resolved in order to arrive at a conclusion" (*id.* at 1326-1327). The Council therefore recommended that where a negotiability issue arises "as a result of a respondent's alleged refusal to negotiate by unilaterally changing an established personnel policy or practice" the Assistant Secretary should be authorized to resolve that issue during a ULP proceeding (*id.* at 1324).

The Authority contends (Br. 40) that Executive Order No. 11,838, adopting those two recommendations, demonstrates that prior to Title VII the ULP process was available for the resolution of compelling need issues that arose from unilateral changes in conditions of employment. But the "compelling need" and "negotiability" changes effected by Executive Order No. 11,838 were entirely separate changes intended to promote very different ends. On the one hand, by introducing the compelling need standard, the Executive Order adopted a limited exception to the principle that agency regulations should be a complete bar to negotiations; but to ensure that "agency regulatory authority [was] retained" (*Leg. Hist.* 1307), the Order provided that compelling need questions would be presented only on limited occasions and only to the Council. On the other hand, the grant of new authority to the Assistant Secretary to resolve negotiability issues in the course of an unfair labor practice determination did

not advert to the issue of compelling need. This new authority was designed to enable the Assistant Secretary to avoid certain inefficiencies that had arisen during ULP proceedings under the previous Executive Order. There is no suggestion anywhere in Executive Order No. 11,838 that the Assistant Secretary was expected to assume any responsibility for the newly-created compelling need determinations. Only the Council was expressly given that responsibility.

2. The legislative history of Title VII itself confirms that Congress never intended the ULP process to be an alternative means of resolving compelling need disputes. Indeed, Congress considered (in a slightly different context) the very question presented in this case and rejected petitioner's interpretation.

a. On July 31, 1978, the House Committee on Post Office and Civil Service reported H.R. 11280, 95th Cong., 2d Sess., entitled "A Bill To reform the civil service laws" (*Leg. Hist.* 372). H.R. 11280 was similar in most respects to the final legislation and served as the model on which Title VII was based.

Section 7117 of H.R. 11280, governing the "duty to bargain in good faith" and "compelling need," differed in two principal respects from the comparable provision in the present Act (*Leg. Hist.* 409). First, unlike the present Act, Section 7117 of H.R. 11280 placed no limits on the duty to bargain about matters covered by agency-wide regulations. Second, H.R. 11280 did not entirely preclude negotiation over matters that are the subject of Government-wide rules and regulations (see 5 U.S.C. 7117 (a)(1)); instead, employing the language now

found in Section 7117(a)(2) as enacted, Section 7117 of H.R. 11280 authorized negotiation over Government-wide rules where "the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists." *Leg. Hist.* 409. Section 7117(b) of H.R. 11280 then set out the procedures for determining compelling need—procedures essentially indistinguishable from the ones presently embodied in Section 7117(b) as enacted. See *Leg. Hist.* 409-410. In short, the version of Section 7117 proposed in H.R. 11280 contained the same compelling need language and procedures that were ultimately enacted, but did so in the context of government-wide—not agency-wide—regulations.

In its report accompanying H.R. 11280, the House Committee addressed, in the context of the provision as it then stood, the question whether unfair labor practice proceedings would be an available means for resolving compelling need issues. The explicit answer was no. The Report states (H.R. Rep. 95-1403, 95th Cong., 2d Sess. 50 (1978), *reprinted in Leg. Hist.* 696 (emphasis added)):

> The committee intends that disputes concerning the negotiability of proposals and matters affecting working conditions, *except for questions of "compelling need" under section 7117*, be resolved through the filing and processing of unfair labor practice charges under section 7116 and section 7118.

Working with language nearly identical to the present version of Section 7117 (except that it was concerned with compelling need for government-wide rather than agency-wide regulations), the House Committee thus interpreted the language in a way

that is flatly inconsistent with the position advanced by the Authority in this case: ordinary negotiability questions should be resolved in the ULP process, but compelling need questions were to be resolved in proceedings provided for in Section 7117.[13] Emphasizing the point, the Report further stated that under Section 7117(b) the Authority should "hold a hearing (in accordance with regulations it shall prescribe) *whenever* an exclusively recognized labor organization alleges that no compelling need exists for a Government-wide rule or regulation which an agency has invoked as a bar to negotiations on a matter" (H.R. Rep. 95-1403, *supra*, at 51-52; *Leg. Hist.* 697-698 (emphasis added)). Further distinguishing the compelling need and ULP procedures, the Committee explained that at the hearings under Section 7117(b) "[t]he Authority's General Counsel may not be a party to the proceeding (as the General Counsel would be in an unfair labor practice case)" (H.R. Rep. 95-1403, *supra*, at 52; *Leg. Hist.* 698).

b. On September 13, 1978, the House adopted an amendment to H.R. 11280, sponsored by Congress-

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[13] The interpretation made by the House Committee is the appropriate one to apply to Title VII as enacted. When Title VII emerged from conference, the conferees adopted the version of Section 7117 passed by the House. See H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 158 (1978). Discussing the compelling need issue, Congressman Ford, a conferee and "a major participant in the fashioning of the House language on Title VII" (*Leg. Hist.* 989 (Rep. Ford)), explained that "[t]he House committee's description of 'compelling need' has continued to be the intention behind this provision" (*id.* at 992), and he reported that the Conference Committee was correct when it stated that in adopting Section 7117 Congress had " 'follow[ed] the House approach throughout th[e] section' " (*Leg. Hist.* 996).

man Udall, whose guiding purpose was to "meet some of the legitimate concerns of the Federal employee unions as an integral part of what is basically a bill to give management the power to manage and the flexibility it needs" (*Leg. Hist.* 923 (Rep. Udall)). The Udall amendment made three pertinent changes to the text of Section 7117, producing the version ultimately enacted by Congress in Title VII. Two of the changes applied to government- and agency-wide regulations; in each case the amendment narrowed the scope of the duty to bargain.[14] Subsection (a)(1) made "Government-wide rules or regulations an absolute bar to negotiations" (*Leg. Hist.* 927). Subsection (a)(2) provided in pertinent

[14] Petitioner acknowledges (Br. 23-24) that the Udall amendment reduced the scope of bargaining over matters governed by government- and agency-wide regulations. It contends, however, that in two other respects the amendment "broade[ned] bargaining rights" (Br. 24). In neither of these other respects is the Authority correct. First, it was not the Udall amendment that made it an unfair labor practice for an agency to enforce a regulation if it conflicted with a collective bargaining agreement that pre-dated the regulation (*ibid.*). The identical language was in H.R. 11280, and the Udall amendment made no change. See *Leg. Hist.* 406, 915, 926. Second, the amendment did not "broaden" the duty to bargain when it permitted unions that represent a majority of the issuing agency's employees to bargain over matters governed by a regulation justified by compelling need. That exception was merely a qualification of the more important change made by the Udall amendment—abandoning the language of H.R. 11280, which would have authorized bargaining over matters covered by any agency-wide regulation, regardless of compelling need. For those reasons and others, critics of the Udall amendment—far from viewing it, in petitioner's words, as effecting "broader bargaining rights" (Br. 24)—declared that the proposal "was written long ago by the Business Roundtable" (*Leg. Hist.* 930 (Rep. Clay)).

part that "agency rules or regulations are a bar to negotiations * * * unless a finding of 'no compelling need' for the rule or regulation is made by the Authority" (*Leg. Hist.* 927).

The most important change made by the Udall amendment was to add what is now Section 7117(c) of Title VII. As noted above (see pages 23-24, *supra*), that Section provides "an expedited appeals system for resolving negotiability disputes other than those involving 'compelling need' determinations" (*Leg. Hist.* 927). See generally *FLRA* v. *OPM*, 778 F.2d at 845-846 & n.8; *National Fed'n of Fed. Employees, Local 1167* v. *FLRA*, 681 F.2d at 889-890 & n.5. Under H.R. 11280 as initially reported, negotiability disputes other than compelling need could only "be resolved through the unfair labor practice mechanism" (*Leg. Hist.* 927). The Udall amendment created an alternative approach to the ULP process, providing "that an exclusive representative may appeal an agency's allegation of non-negotiability to the Authority" (*ibid.*). The purpose of Section 7117(c) was to ensure, to the extent possible, "that negotiability disputes not be subject to the cumbersome unfair labor practice procedures, but be resolved through the streamlined Section 7117(c) process." *AFGE* v. *FLRA*, 715 F.2d 627, 630 (D.C. Cir. 1983). But Congress made it clear ("may appeal") that this was only an optional alternative to raising the issue in a ULP proceeding: when Congress intended to allow alternative procedures, it knew how to do so. Cf. *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981).

c. Despite the foregoing, the Authority claims to find no evidence in the legislative history that Congress intended to depart from what it calls the "basic

tenet of labor law that an employer assumes the risk of having breached [the duty to bargain] whenever the employer unilaterally changes working conditions without bargaining" (Br. 29). That claim misstates the significance of private-sector labor law for the present issue.

In general, petitioner greatly overstates the extent to which Congress intended to apply private-sector labor law principles when it enacted Title VII. *Cf. BATF* v. *FLRA*, 464 U.S. at 103. The statute proclaims at the outset that its purpose is "to prescribe certain rights and obligations of the employees of the Federal Government" while at the same time "establish[ing] procedures which are designed to meet the special requirements and needs of the Government" (5 U.S.C. 7101(b)). As President Carter explained when he transmitted the proposed legislation to Congress, Title VII was designed "to make Executive Branch labor relations more comparable to those of private business" while still deferring to "the paramount public interest in the effective conduct of the public's business" (*Leg. Hist.* 626). "Congress recognized that it could not merely transplant private employment statutes to the public employment context" (*AFGE* v. *FLRA*, 778 F.2d at 852), and "the degree of relevance of private sector case law to public sector labor relations will vary greatly depending upon the particular statutory provisions and legal concepts at issue" (*Library of Congress* v. *FLRA*, 699 F.2d at 1287). See generally Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 Yale L.J. 1107 (1969).

In particular, private-sector principles are not very helpful in determining the scope of a govern-

ment employer's duty to bargain. "The scope of collective bargaining is far broader in the private sector, and the bargaining status of any given subject is determined by different statutory provisions and by different policy considerations" (*Library of Congress* v. *FLRA*, 699 F.2d at 1287 (footnote omitted)). Indeed, petitioner relied on that basic distinction in *NTEU, Chapter 207 & FDIC Corp.*, 14 F.L.R.A. 598 (1984). In that case the Authority rejected the views of its dissenting member, who had suggested that a particular negotiability dispute be left to the collective bargaining process, just as it would have been had the "matter * * * arisen in the private sector context" (14 F.L.R.A. at 612). The majority retorted, "it should be clear by now, over 5 years having passed since the enactment of the Statute, that the legal framework which governs our decision today was 'designed to meet the special needs and requirements of government.' Part of the legal framework which governs our decision today is section 7117(a)(2) * * *. Our colleague favors 'free' collective bargaining. We favor collective bargaining within the statutory framework." *Ibid.* (footnote omitted).

D. Petitioner's Reliance on "Considerations of Public Policy" is Misplaced

All but ignoring the text, and finding nothing in the history of Title VII to support its position, petitioner relies on two "considerations of public policy" (Br. 42). First, it states that "it is in the interest of the efficient and effective administration of the Statute that all issues which arise in an unfair labor practice dispute be resolved in that unfair labor practice dispute" (*id.* at 42-43). Second, it asserts that "[t]here are no drawbacks" to its approach, since "regardless of whether the compelling need is-

sue is processed as part of a unilateral change unfair labor practice case, agencies remain able to * * * enforce, as a bar to collective bargaining, any regulation which Congress intended to bar collective bargaining" (*id.* at 43).

Petitioner's efficiency claim misdirects the eye. There is no reason to think it is efficient to resolve "compelling need" along with all other issues in a ULP proceeding, rather than in the expeditious separate appeal Congress directed the Authority to provide for. And if Congress thought it best to resolve all issues in a ULP proceeding, it is hard to see why it enacted section 7117(b) to resolve compelling need claims, or why it established Section 7117(c) as an alternative means of resolving all other negotiability questions. The answer, plainly, is that Congress recognized that a separate, expedited procedure for deciding compelling need issues would serve the larger efficiency goal of permitting the issuing agency to defend its regulations, to the FLRA itself, without the adversarial baggage of the ULP process. That goal—and not petitioner's assertion of "unified processing" (Br. 43)—is intimately tied to the explicit policy of Title VII "to prescribe certain rights and obligations of the employees of the Federal Government" while at the same time "establish[ing] procedures which are designed to meet the special requirements and needs of the Government" (5 U.S.C. 7101(b)).

The Authority is on no firmer ground when it casually contends that there are "no drawbacks" (Br. 43) to its approach in this case. That claim is, first of all, irrelevant, since Congress is entitled to expect its statutes to be obeyed, even when there are "no drawbacks" associated with disobedi-

ence. Cf. *AFGE* v. *FLRA*, 715 F.2d at 627, 630 (rejecting as a "contraven[tion] [of] the clear statutory mandate" FLRA's assertion that it had a "discretionary power" to deny appeals taken under Section 7117(c)). But petitioner's claim is also mistaken. Permitting the issuing agency to defend its regulations in a separate proceeding before the Authority ensures that the best defense of those regulations will be made, and that the agency will not risk conflicting compelling need determinations arising from scattered ULP proceedings at the local level.[15] Exposing the agency to ULP liability, and retroactive sanctions (see 5 U.S.C. 7118(a)(7)), disrupts the regulatory process and disserves the evident intent of Congress that the provisions of Title VII "be interpreted in a manner consistent with the requirement of an effective and efficient Government" (5 U.S.C. 7101(b)).

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[15] The Authority recognized that point in *Association of Civilian Technicians, Montana Air Chapter* v. *FLRA*, *supra*. In that case a union raised an equal protection challenge to Section 7117(a)(3) of Title VII, which permits an exclusive representative to negotiate about matters covered by an agency regulation—regardless of compelling need—when it "represents an appropriate unit including not less than a majority of the employees in the issuing agency * * * to whom the rule * * * is applicable." The union asserted that there was no rational basis for distinguishing between large and small labor organizations. The Authority persuaded the court of appeals (see 756 F.2d at 178) that the distinction in Section 7117(a)(3) was rational, arguing in its brief that "Congress' action ensured that an agency's regulations for which there is a compelling need would not be subject to different sets of negotiations in numerous bargaining units throughout the agency, with the potential for such negotiations yielding widely disparate results throughout the agency" (FLRA Br. at 22 (cited at 756 F.2d at 178 n.29)).

We accept the general proposition that "the Authority is entitled to considerable deference when it exercises its 'special function of applying the general provisions of the Act to the complexities' of federal labor relations" (*BATF* v. *FLRA*, 464 U.S. at 97 (citation omitted)). But as the Court explained when it rejected the Authority's interpretation of Title VII in the *BATF* case, "the 'deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress'" (*ibid.* (citation omitted)). In the present case, as in *BATF*, "the FLRA's decision * * * neither rests on specific congressional intent nor is consistent with the policies underlying the Act" (*id.* at 98 n.8). Reliance on untethered and in any event erroneous "considerations of public policy" is no substitute for the text and history of the statute. And deference to the Authority's discretion in this case comes at the considerable expense of the more fundamental discretion of other federal agencies—whose capacity to regulate their own affairs would be adversely affected by the Authority's construction of Title VII.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL LABOR RELATIONS AUTHORITY,
PETITIONER

v.

ABERDEEN PROVING GROUND,
DEPARTMENT OF THE ARMY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Under the Authority's construction of its enabling statute, the Authority is empowered to resolve, in a unilateral change unfair labor practice case, an employer agency's defense that bargaining is barred by an agency regulation for which a compelling need exists. Aberdeen's arguments to the contrary in its brief reveal several fundamental misconceptions about the framework established by the Statute for collective bargaining in the federal sector. First, Aberdeen's attempt to contrast Sections 7117(b) and (c) by arguing that the Statute allows the union in all cases to choose between processing Section 7117(c) negotiability issues under either the negotiability appeal procedure or the unfair labor practice procedure is demonstrably incorrect. Next, Aberdeen attempts to support its proffered view of the statutory language with policy arguments which simply do not fit with the scope of collective bargaining established by the Statute. Finally, and with no support

from the legislative history or pre-Statute Executive Order practice, Aberdeen's view of the Statute disregards an established tenet of *federal sector* labor law that if it subsequently can be shown that the employing agency changed working conditions but refused to bargain over matters which were properly within the bargaining obligation, the employing agency has committed an unfair labor practice.

A. Aberdeen, in its effort to read the Statute as prohibiting the Authority from ever resolving Section 7117(b) negotiability issues outside the Section 7117(b) negotiability appeal procedure, attempts a construction of Section 7117(c). Aberdeen argues (Aberdeen Br. 22-25) that Congress intended to contrast the operation of Section 7117(c) with Section 7117(b) by conferring upon the union the option of processing Section 7117(c) negotiability issues as either negotiability appeals or unfair labor practices. Aberdeen is simply wrong. The union does not, absent a dispute involving an employing agency's actual or contemplated change in conditions of employment, have the option of processing a Section 7117(c) negotiability dispute as an unfair labor practice. *National Labor Relations Board Union* v. *FLRA*, No. 86-1624 (D.C. Cir. Dec. 4, 1987) slip op. 15-22 (to be reported at 834 F.2d 191) (noting, among other things, the consistency of the Authority's construction of Section 7117 with Executive Order practice). As specifically stated in the Authority's regulations, which govern the resolution of both Section 7117(b) and Section 7117(c) negotiability appeals: "Cases which solely involve an agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained *and which do not involve actual or contemplated changes in conditions of employment may only be filed under [the negotiability appeal procedures]*." 5 C.F.R. 2424.5 (emphasis added). See *National Labor Relations Board Union* v. *FLRA*, *supra*, slip op. 15-16.

The reasoning that Aberdeen uses in arriving at this error highlights the failing of Aberdeen's approach to this entire case. Section 7117(c)(1) of the Statute states, in part, "if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation [of nonnegotiability] to the Authority in accordance with the provisions of this subsection." 5 U.S.C. 7117(c)(1). Aberdeen seizes upon the phrase "the exclusive representative may appeal" (Aberdeen Br. 23-24). Aberdeen contrasts this with the phrase in Section 7117(b)(2) "the Authority shall determine" (Aberdeen Br. 24). Aberdeen asserts the Statute intends that with respect to the resolution of some negotiability issues the union is being given the option of pursuing a negotiability appeal under Section 7117(c) or an unfair labor practice proceeding under Section 7118, but that with respect to the resolution of compelling need negotiability issues the union can only seek resolution under the Section 7117(b) negotiability appeal procedure (Aberdeen Br. 23-25).[1]

The problem with Aberdeen's reading is that it divorces the phrasing of the Statute from the Statute's structure, context, and purpose. First of all, the phrases

[1] Of course, regardless of whether the compelling need issue arises as an agency allegation of nonnegotiability at the bargaining table or arises as an agency defense for its failure to bargain in a unilateral change unfair labor practice case, it is the union which seeks the Authority's resolution of the issue. Just the opposite is the case when an arbitrator orders agency action which the agency asserts is inconsistent with an internal agency regulation for which there is a compelling need. The Authority resolves these agency assertions of compelling need under the arbitral review procedures in Section 7122 (see cases cited at FLRA Br. 32 n.28). Under Aberdeen's reading of the Section 7117(b) procedure as the exclusive means for resolving compelling need issues, a procedure which only the union can invoke, an agency would not be permitted to raise a compelling need defense to implementation of an arbitral award.

Aberdeen chooses to contrast are not even parallel. Section 7117(b) speaks of what the Authority shall do once the union files such an appeal; Section 7117(c)(1) speaks of what the union may do – that is, it may appeal.[2] Then Aberdeen misconstrues the meaning of Section 7117(c)(1)'s statement, "the exclusive representative may appeal." That phrase simply indicates that the union's options, upon receiving an agency's allegation of nonnegotiability, include not filing a negotiability appeal. For example, the union may return to the bargaining table and propose alternatives or bargain over agency counterproposals. See generally *AFGE, Local 2303* v. *FLRA*, 815 F.2d 718, 722 (D.C. Cir. 1987). The permissive language in Section 7117(c) also prevents an agency's informal allegation of nonnegotiability from ineluctably triggering the 15-day time limit that Section 7117(c)(2) imposes on the filing of negotiability appeals. *Ibid.*

Aberdeen's misreading of the language of the Statute not only divorces the terms used in Sections 7117(a)(2) and 7117(b)(1) from their object purpose of creating a negotiability appeal procedure, it also construes that language without an appreciation of the limited circumstances in which internal agency regulations bar bargaining and without an appreciation of the law that obligates an employer to bargain over negotiable matters when it alters conditions of employment. In so doing, Aberdeen ignores the admonition of this Court that "the text is only the starting point." *Kelly* v. *Robinson*, No. 85-1033 (Nov. 12, 1986), slip op. 6. And as this Court has noted on numerous occasions, " ' "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." ' " *Offshore Logistics, Inc.* v. *Tallentire*, No. 85-202 (June 23, 1986) slip op. 13 (quoting *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 285 (1956) (quoting *United States* v. *Heirs of Boisdore*, 8 How. 113, 122 (1849))).

[2] Section 7117(b)'s statement that "the Authority shall determine" is a reference to the Authority's obligation to resolve the issue when the union initiates a Section 7117(b) compelling need negotiability appeal. Section 7117(c)(6) (5 U.S.C. 7117(c)(6)) imposes a similar obligation upon the Authority when the Authority resolves a union's Section 7117(c) negotiability appeal.

B. Aberdeen's attempt at finding "important purposes" (Aberdeen Br. 17, 26-30) to support a reading of the Section 7117(b) negotiability appeal procedure as "exclusive," but not the Section 7117(c) negotiability appeal procedure, has the effect of inverting the strength of the Statute's various negotiability bars and ignores both Executive Order practice as well as the Statute's legislative history.

First, Aberdeen erroneously contends that a compelling need negotiability determination involves a challenge to the importance and legitimacy of internal agency regulations that otherwise have the force of law (Aberdeen Br. 17, 26). A compelling need inquiry is nothing more than an inquiry into whether the agency's decision to exercise, in an agency regulation, its discretion over a matter – a matter which is not removed from collective bargaining by, for example, the scope of the nonnegotiable management rights in Section 7106 or by federal law or by government-wide regulation – should have the effect of removing an otherwise negotiable proposal from the scope of the duty to bargain. Contrary to Aberdeen's contention (Aberdeen Br. 17, 26), the Authority's determination that an internal agency regulation does not bar collective bargaining is not a determination that the regulation is illegitimate or invalid (see 1975 Council Report discussion at FLRA Br. App. 5a). In fact, an agency regulation does establish

the rights and obligations within the agency in all circumstances except where the agency, in fulfilling its statutory collective bargaining obligation, agrees otherwise.[3]

In turn, the limited nature of this negotiability barrier is beyond dispute. This conclusion follows from an understanding of Executive Order practice (see 1975 Council Report at FLRA Br. App. 1a-10a);[4] an appreciation of the legislative history of the Statute;[5] and an

[3] Aberdeen's contention that Congress gave the employing agency the right to waive an assertion of compelling need (5 U.S.C. 7117(b)(2)(A)) because Congress thought the compelling need inquiry was "especially intrusive" (Aberdeen Br. 27) is a characterization of Aberdeen's invention, with no support in fact, and with no appreciation of why that waiver opportunity was incorporated originally into the Executive Order. See FLRA Br. 21 n.9 and 1975 Council Report discussion at FLRA Br. App. 2a-3a, 8a.

[4] Indeed, it is Aberdeen which notes that the Federal Labor Relations Council (the Authority's pre-Statute predecessor and promulgator of similar compelling need criteria) explained that its compelling need criteria established "a stringent standard" and that they were "designed and adopted to the end that internal 'agency regulations not *critical* to effective agency management or the public interest' " not preclude collective bargaining (Aberdeen Br. 28 n.11 (emphasis in original)).

[5] See H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 51 (1978) ("The committee intends that [the Authority's compelling need] criteria be similar to those promulgated by the Federal Labor Relations Council * * *."), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 697 (Comm. Print No. 96-7) (*Legis. Hist.*). And, as stated by Representative Ford (acknowledged by Aberdeen to be "a major participant in the fashioning of the House language on Title VII" (Aberdeen Br. 37 n.13) (citation omitted)): "The compromise position in section 7117 was accepted with the understanding that * * * the compelling need test will be *permitted to be raised* in only a limited number of cases." 124 Cong. Rec. 29199 (1978) (emphasis added), *reprinted in* Legis. Hist. at 956.

understanding of the Authority's compelling need criteria and the application of those criteria (see FLRA Br. 24-27). As a result, internal agency regulations are one of the Statute's least restrictive bars to bargaining.

Next Aberdeen asserts (Aberdeen Br. 30) that an agency should not be put "at peril" of an unfair labor practice when it changes conditions of employment, refuses to bargain, and then defends its refusal to bargain by mistakenly asserting the compelling need negotiability defense. Yet it is well established that the Statute imposes upon an agency a duty to bargain over matters within the duty to bargain when it seeks to change conditions of employment, and that a breach of this duty to bargain can constitute an unfair labor practice. See *FLRA* v. *Social Security Administration*, 753 F.2d 156 (D.C. Cir. 1985); *FLRA* v. *United States Department of the Air Force, Tinker Air Force Base*, 735 F.2d 1513 (D.C. Cir. 1984). Aberdeen's reading of the Statute would reward an employing agency, involved in defending its refusal to bargain in a unilateral change unfair labor practice case, for its choice of a litigation defense rather than the merits of that defense. And ironically, the specific litigation defense so rewarded is one of the Statute's least restrictive bars to bargaining. See FLRA Br. 19-27.

C. Aberdeen's attempt to find support for its reading of the Statute in either the pre-Statute Executive Order practice or in the Statute's legislative history is unavailing. Most significantly, however, Aberdeen points to no indication that Congress, in crafting and continuing a negotiability appeal procedure for compelling need issues, desired to undo the principle that, regardless of the nature of an agency's negotiability defense, an agency breaches the "continuing obligation" to bargain whenever it unilaterally changes conditions of employment and, in so doing, refuses to bargain over a matter

that subsequently can be shown to have been within the duty to bargain.[6]

In discussing the 1975 changes to Executive Order 11491, as amended, Aberdeen contends (Aberdeen Br. 30-35) that the decision to lessen the negotiability barrier of internal agency regulations and the decision to allow the resolution of negotiability issues in unilateral change unfair labor practice cases "were entirely separate changes intended to promote very different ends." (Aberdeen Br. 34). Aberdeen misses the point. Both these changes were part of an overall revision of the Executive Order and were simultaneously incorporated into Executive Order 11491 (by Executive

[6] The Authority, in discussing the Udall substitute which, in this area ultimately became the terms of the enacted Statute, noted (FLRA Br. 24) that the substitute "did contain two specific changes from the Executive Order approach, in the direction of broader bargaining rights." Aberdeen's quarrel with this observation (Aberdeen Br. 38 n.14) stems from Aberdeen's failure to note that the Authority was comparing the Udall substitute with the Executive Order, not with other House bills.

While the Udall substitute offered certain broader bargaining rights than the Executive Order, the Senate bill generally paralleled the more restrictive Executive Order. See generally *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1154-1157 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982); *AFGE* v. *FLRA*, 712 F.2d 640, 647-648 (D.C. Cir. 1983). Yet despite the Senate bill's more restrictive approach, it was the Committee Report of the Senate bill which stated: "Where agency management proposes to change established personnel policies, the exclusive representative must be given notice of the proposed changes and an opportunity to negotiate over such proposals to the extent they are negotiable." S. Rep. No. 95-969, 95th Cong., 2d Sess. 104 (1978), *reprinted in Legis. Hist.* at 764. See *Department of the Air Force, Scott Air Force Base, Illinois*, 5 F.L.R.A. 9, 10-11 (1981). In Aberdeen's failed attempt to relegate this well-established principle of labor law to only the private sector (Aberdeen Br. 39-41), Aberdeen does not acknowledge this legislative history.

Order 11838).[7] As revised, section 11(d) of the Executive Order stated that as part of a unilateral change unfair labor practice case, "those determinations of negotiability [could be made] as may be necessary to resolve the merits of the alleged unfair labor practice";[8] section 11(c) itemized those determinations of negotiability;[9] and section 11(c)(4)(ii) referenced the compelling need standard for internal agency regulations as one of those determinations of negotiability.[10] Even the court below disagrees with Aberdeen's reading of the Executive Order, stating the Authority is "correct that under the Order, as it existed at the time the [Statute] was passed, the procedure they recommend today was followed." *Fort Belvoir*, Pet. App. 60a.

Aberdeen fares no better when it turns to examine congressional deliberations over the Statute. Citing solely the fact that the House Committee bill had only one negotiability appeal procedure, used for resolving compelling need issues, Aberdeen argues (Aberdeen Br. 35-36) that the House Committee bill intended to prohibit the resolution of compelling need negotiability defenses in unilateral change unfair labor practice cases. Not only was this legislative proposal not enacted, but Aberdeen errs in reading anything into the House Committee proposal that would even relate to the issue in this case. The fact that the House Com-

[7] Executive Order 11838 (1975), 3 C.F.R. 957, 959 (1971-1975 comp.), *reprinted in Legis. Hist.* at 1336, 1339.

[8] Executive Order 11491, as amended, § 11(d), *reprinted in Legis. Hist.* at 1346.

[9] *Id.* at § 11(c); see also *id.* at § 4(c)(2), *reprinted in Legis. Hist.* at 1343.

[10] Executive Order 11491, as amended, § 11(c)(4)(ii), *reprinted in Legis. Hist.* at 1346.

mittee bill contained a negotiability appeal procedure for resolving compelling need issues does not, without more, reveal an intent to bar resolution of those issues in a unilateral change unfair labor practice case any more than did the existence of a similar negotiability appeal procedure bar such resolution under the Executive Order. In this vein, the Statute continues the Executive Order practice of providing a negotiability appeal procedure for resolving *all* negotiability issues; even Aberdeen does not assert that the existence of such a procedure bars resolution in a unilateral change unfair labor practice case of negotiability issues otherwise resolved under the Section 7117(c) negotiability appeal procedure.

D. Finally, Aberdeen erroneously argues (Aberdeen Br. 23, 28-29, 37) that the Authority's allowing the resolution of a compelling need negotiability issue in a unilateral change unfair labor practice proceeding improperly disregards the various procedural features of a Section 7117(b) negotiability appeal proceeding. However, as noted in the Authority's opening brief (FLRA Br. 34-35), among other things the various features of a Section 7117(b) proceeding are, with one exception,[11] also features of a Section 7117(c) proceeding; and neither Aberdeen nor the decision of the

[11] In a Section 7117(b) negotiability appeal, in the event the Authority exercises its discretion and holds a hearing, the agency is a necessary party. Aberdeen ignores (see Aberdeen Br. 27, 29, 42, 43) the fact that the Statute's requirement of agency participation comes into play only when the Authority decides to hold a hearing. Moreover, while Aberdeen, in its effort to contrast the two types of negotiability proceedings, suggests to the Court that the difference between agency participation in a Section 7117(b) and a Section 7117(c) hearing is "crucial" (Aberdeen Br. 26 n.8), this difference has yet to surface in the 9-year history of the operation of the Statute. See *Defense Logistics Agency* v. *FLRA*, 754 F.2d 1003, 1011 n.13 (D.C. Cir. 1985).

court below suggests that the Authority contravenes the Statute when it resolves in a unilateral change unfair labor practice case the types of agency negotiability defenses that would otherwise be processed under the Section 7117(c) procedure.

Finally, we note once again that the Authority has "good reasons" (*Defense Logistics Agency* v. *FLRA*, *supra*, 754 F.2d at 1014) for its consistent construction of its enabling act. It is in the interest of the efficient and effective administration of the Statute that all issues – including compelling need issues – which arise in a unilateral change unfair labor practice dispute be resolved in that proceeding. Otherwise the very "inefficiencies," which Aberdeen acknowledges prompted the 1975 adoption of such unified processing under the Executive Order (Aberdeen Br. 35), would resurface. See *Defense Logistics Agency* v. *FLRA*, *supra*, 754 F.2d at 1014.

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